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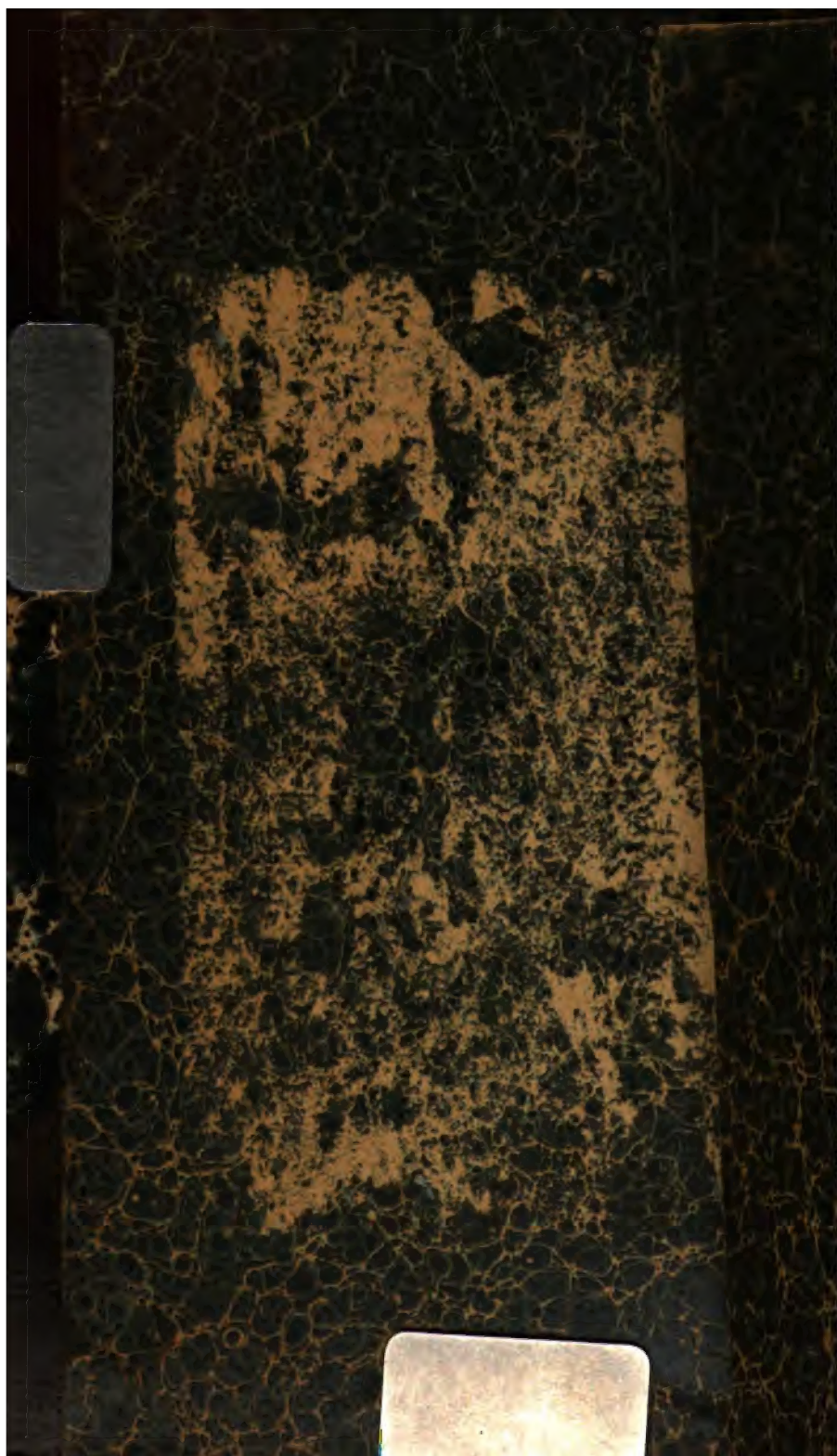
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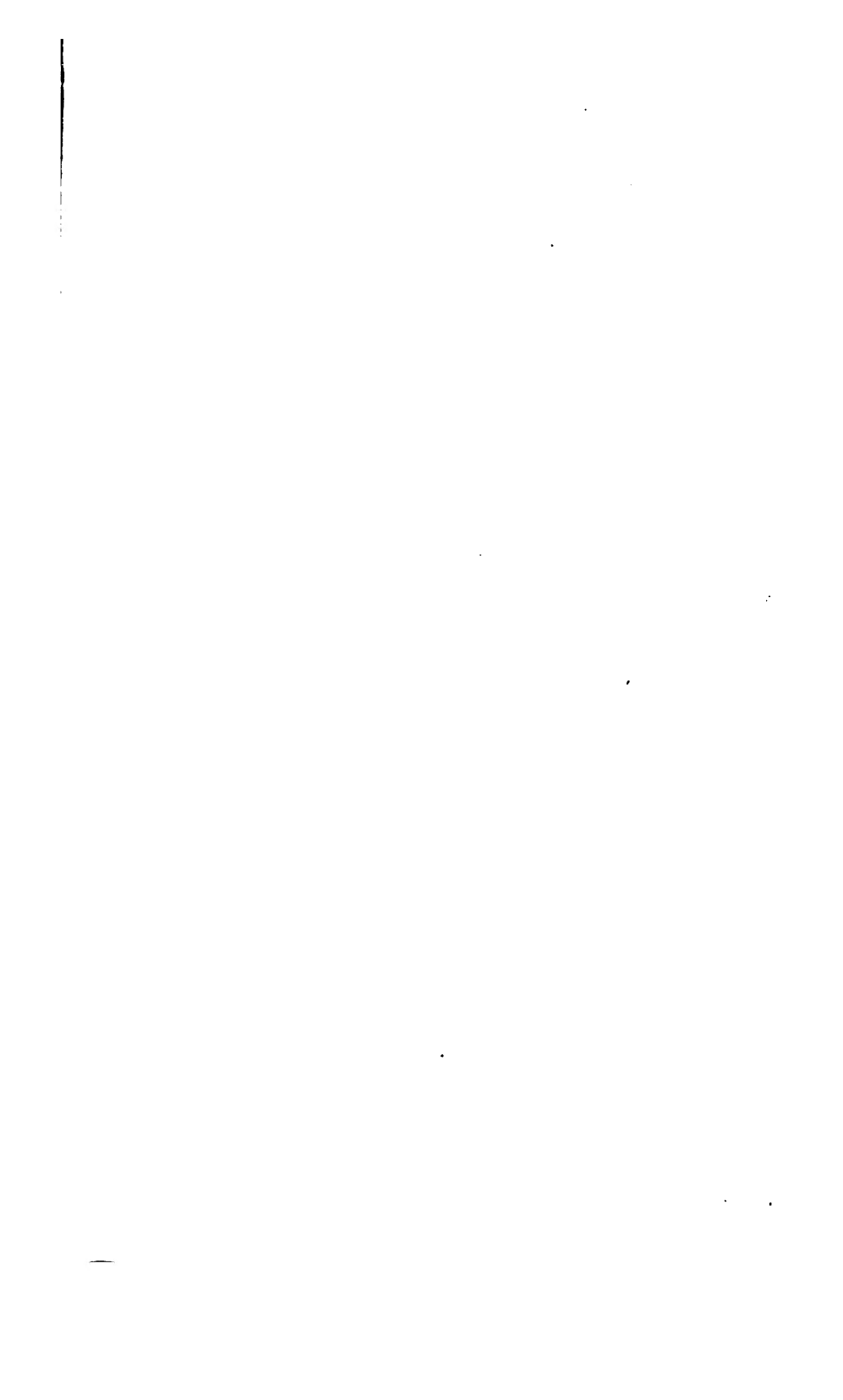


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**PETER S. DUPONCEAU.**

**A**

**S Y S T E M**

**OF THE**

**L A W S**

**OF THE**

**STATE of CONNECTICUT.**



**By ZEPHANIAH SWIFT.**

**VOLUME I.**



**WINDHAM: PRINTED BY JOHN EYRE, FOR THE AUTHOR.**

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УВАЖЕЛИ ОБОЖАТЕ

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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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## INTRODUCTION.

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### Of Law and Government.

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#### SECTION FIRST.

##### PRELIMINARY OBSERVATIONS.

**E**VERY citizen in the state, ought to acquire a knowledge of those laws, that govern his daily conduct, and secure the invaluable blessings of life, liberty and property. The best method to diffuse this knowledge thro all ranks, is to simplify, and systematize the laws. No country is favored with a more perspicuous code than the state of Connecticut; yet in no country is it more arduous and difficult to obtain a systematic understanding of the law. The cause of this singular inconvenience merits particular investigation.

The common law of England is obligatory in this state by immemorial usage, and consent, so far as it corresponds with our circumstances and situation. As we have no treatise upon our laws, we are under the necessity of becoming acquainted with the English code for the purpose of understanding our own. The operation of the English common law, is ascertained by no general rule, and is bounded by no known line: it can be learned only from the decisions of our courts. A common law peculiar to ourselves, resulting from our local circumstances, has been established by the decision of our courts; but has never been committed to writing. A difference in the form of the government, the manners of the people, and the circumstances of the country, furnished cases to which the com-

mon law could not be supposed to extend, and rendered necessary the introduction of statutes to supply the defect, and compleat the system of jurisprudence.

From this representation, it is easy to imagine the great labor, and difficulty of becoming thorough masters of our laws. The student must wander through the wide field of English jurisprudence, without a guide to direct him in the way. Having acquired much useless learning, in becoming acquainted with that voluminous code, he finds himself forever embarrassed with doubt and uncertainty, for want of some general rule, to determine what part of it has been approved of, and adopted by his own country. When he directs his enquiries to ascertain the common law, introduced by the decisions of our own courts, he can find it only in oral tradition, and the transient memory of judges and lawyers. The alphabetical arrangement of the statutes, renders it a laborious effort of the mind, to acquire a systematic knowledge of them by reading and study. This evidences that the only method of obtaining a knowledge of that science, which furnishes rules to which we are constantly bound to conform our conduct, is by a long attendance on court; and this points out the necessity and importance of a treatise, that contains a full account of the institutions of our country.

These considerations have induced the author of this work, to make the following methodical compilation, for the purpose of remedying these inconveniences, and unfolding the beautiful simplicity of our excellent system of jurisprudence. The plan he has adopted is to exhibit a compleat systematic view of our constitution and laws: to select and extract from the common law of England, that portion of it which has been received and approved from time immemorial, and has become valid and binding in this state: to collect, and arrange in proper order, those principles and doctrines, which have become law by the usage and practice of the people, and the decisions of courts: and with these to interweave and connect the positive regulations introduced by statute. This plan is intended to afford the student the satisfaction and delight of arranging his studies in proper method, of extending his mind at one view thro all the various branches of jurisprudence, of beholding the connection  
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## PRELIMINARY OBSERVATIONS:

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and mutual dependence of all the parts, and of comprehending the beautiful order, and symmetry of the whole.

Not only the student may be assisted by a work of this kind, if well executed; but many other persons may derive essential advantage from it. No gentleman ought to consider his education compleated till he has gone through a course of studies upon the laws of his country. In the present state of this science, but few have leisure to acquire the knowledge of it, and fewer have fortunes sufficient to purchase the necessary books. This work is intended to furnish a man, who does not follow the profession, with sufficient knowledge of the law, for the purposes of contemplation, and amusement, and the ordinary business of life. There are many persons who are honored by the suffrages of their fellow-citizens, with seats in the legislature, who by reason of their employments, cannot be acquainted with our laws, in their present unwieldy voluminous state. Yet they are ill qualified to be legislators, without some knowledge of the fundamental principles of law, and the nature and extent of government. There are but few persons who are not frequently in the course of their lives called upon to decide upon the rights, and even upon the lives of their fellow-citizens as jurors. In this situation they are obliged to form judgments upon points of great importance and nicety, that require a considerable share of knowledge. This treatise is intended to furnish such persons with the information necessary for the faithful discharge of such important trusts.

But there is no order of men who can receive more benefit from such an undertaking as the present, than those who have the honor to hold commissions of the peace. Their extensive jurisdiction in criminal cases, and their power of trying matters of a civil nature, frequently render it necessary for them to determine questions of as much intricacy and nicety, as any that come before the highest courts. But few of them from their situation in life, can pay that attention to the study of the law, by which in its present state they can acquire the knowledge necessary to qualify them to fill their places with dignity and respectability. The consequence is, that their erroneous determinations render them contemptible, and their ignorance subjects them to the impositions of the artful and designing

ing. Unhindered in the mere formality of making entries of their proceedings and judgments, their records often furnish abundant matter of ridicule, when exposed to public view in writs of error brought to the superior court. To furnish justices of the peace with a plain treatise, by which they can with facility acquire the information requisite to qualify them to discharge the duties of their office with honor, and administer justice with impartiality, is the most important object of this work.

But it is not expected that those gentlemen who move in the higher ranks of judicature, or who are immediately conversant in the practice of the law, will derive any benefit from these disquisitions. Their benevolence and patriotism will induce them to encourage an undertaking that is calculated to disseminate useful knowledge, and augment the happiness of the people.

To every citizen of Connecticut, nothing can afford a more heart-felt delight than the consideration, that in no country on the globe, is there a more general diffusion of knowledge among all classes of people.—The universal attention paid to education, has laid the permanent foundation of a general taste for science and reading.—The various branches of literature by means of systematic treatises are within their reach : but the jurisprudence of the country is surrounded by such thick clouds of technical jargon and abstruse learning, that it is inaccessible to the mass of the people. To dissipate the darkness which has so long veiled this interesting science, and to disclose to the people a full view of those rules which govern their daily conduct, is the great object of this work. All that technical intricacy which has so long disfigured the science of jurisprudence, will be avoided, and our laws simplified and systematized, will be presented in a form intelligible to every capacity. A treatise calculated for this purpose is all that is now necessary to disseminate, as large a share of general and useful knowledge, as can be acquired by the body of the people. A republican form of government will then have the fairest chance to be put to the test of experiment. We shall be able to ascertain what portion of political happiness, a people are capable of attaining when they are well informed, and the quantity of civil liberty which is compatible  
with

with that energy in government which is necessary to preserve the peace and good order of the community. Those gentlemen who have a relish for literature, may pursue their enquiries respecting the laws of their country with as much facility and amusement, as they can the other branches of science, while a complete view and accurate delineation of our legal code, will render its superior excellence the object of general admiration and regard.

In accomplishing this work, the author has followed the practice of all writers on this subject. He has not scrupled to take advantage of the writings of all who have preceded him, and the plans and methods which they have adopted. The merit of the performance depends upon its being a faithful digest, and accurate compilation of principles already known and established, and not on new and original observations and discoveries. Far more delightful would it be to indulge the mind in wandering into the regions of fancy, and in exploring the fields of science, to select the most pleasing and splendid topics for discussion and illustration. But I must adopt the language of an eminent reporter ; “ The nature of the undertaking precludes that sort of ambition, by which authors are so often animated, and my utmost aim will be attained, if I shall be found in any degree to have merited the humble praise of useful accuracy : ubi ingenio non erat locus, cura testimonium promeruisse contentus.”

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#### SECTION SECOND.

#### OF LAW IN GENERAL.

**L**AW, in the limited sense in which we are to consider it in the course of our disquisitions, is the rule of human conduct in a state of society. But in its most extended sense it may be defined to be a rule of action, applicable to animate and inanimate nature, and comprehending all the general principles of action, that are established in the system of the universe. To obtain a clear idea of the import of this term in its various and qualified meanings, we must survey that system of things from which laws originate, and in which they are established.

Philosophical

Philosophical discoveries have unfolded to mankind the magnificent and sublime idea, that universal space is adorned with innumerable systems of worlds—that all the stars like our sun, are suns to planetary systems—that the planets perform regular revolutions in their orbits, and are peopled by an infinite variety of inhabitants. These systems again perform one grand revolution around a common center, the center of Infinity, the throne of the Supreme Intelligence, the great first Cause—where his almighty power communicates life and motion to all nature, where his omniscient eye contemplates the ineffable glories of his works, and his boundless benevolence derives immeasurable delight, from diffusing infinite felicity to innumerable ranks of being; while the music of the spheres resounds a perpetual song to his praise.\* This glorious representation of universal nature, exhibits the most exalted view of the transcendent excellence and boundless power of the Supreme Deity, whose almighty fiat called all worlds into existence, and impressed upon them those general and immutable laws, that will regulate their operation through the endless ages of eternity. The Supreme Being whose attributes are infinite power, wisdom and goodness, has formed this system upon the most perfect plan. He diffuses the greatest possible happiness, and distributes impartial justice to all intelligent and rational creatures—Tho our imperfect natures disqualify us, to reconcile all events that come within our knowledge, to the attributes of the Deity; yet if we could scan the universe, and discover the final result of all things, there is no doubt but that we should be delighted at the glorious manifestations of justice, and the liberal diffusion of felicity. The Deity having from all eternity, established the general laws that will operate with invariable certainty through all eternity, he is capable of foreseeing all events, that will take place, and of course, all things past, present, and to come, are forever in the view of his omniscient mind.

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\* Astronomers have discovered that the stars which are commonly supposed to be fixed, have a regular motion, which renders it probable, that they have a revolution round a common center. The precession of the equinoxes can better be accounted for on this hypothesis, than any other. The idea of the music of the spheres originated with Pythagoras, and probably was suggested by his singular theory of philosophy, that the first principles of things consisted in the harmony of numbers. Upon this idea, he has erected the most fanciful fabric of philosophy of any of the ancients. A contemplation of the revolution of all the planetary systems round a common center, accompanied by the music of the spheres, unfolds the most elevated and transcendent idea of the supreme character.

These general laws resulting from the original principles and fitness of things, and applicable to animate and inanimate matter, and rational and irrational beings, are denominated the laws of nature. The limited state of our faculties, renders it impossible for us to obtain a clear discovery of the infinite extent and universal operation of those laws. A full prospect of the glories of nature and a knowledge of the ultimate cause of things, must be hid from us, till our intellectual faculties are enlarged in some future state of existence. The astronomer has discovered the agency of gravitation in effecting the revolution of the heavenly bodies. The philosopher has investigated the laws of motion, the mechanical powers, the laws of optics, fluids, and electricity. The chemist has demonstrated that the composition and decomposition of material substances, are caused by the power of attraction, of cohesion, and repulsion. These, and many more which it is not my province to enumerate, constitute the laws of nature that respect the material world.

Man, who is the subject of these enquiries, is a compound being, consisting of matter and mind. The generation, organization, nutrition and existence of the material part, depend upon the same laws, as matter. The mind ennobles him with the highest privileges and excellencies, and renders him capable of sensation.—By means of the senses he obtains a knowledge of the beauties of nature with which he is surrounded—Endowed with reason, he is capable of thinking, and judging respecting the ideas communicated to him by his senses—Susceptible of the feelings of pleasure and pain, he is rendered an active being and impelled by a thousand motives, to shun the various scenes of misery, and pursue the fleeting objects of happiness. In this pursuit, his mind is under the influence and government of those motives which result from the established order of things ; but as he feels that he has the power of doing as he pleases, he considers himself to be a free agent and responsible for his conduct. Invested with a conscience or moral sense, he is qualified to distinguish between right and wrong, and ascertain the boundaries between virtue and vice. This monitor enthroned in his heart, furnishes him with the transport of self approbation, when he pursues the path of virtue and points the



the dagger of horror and remorse to his soul, when he obeys the allurements of vice. Man as a moral agent, is subject to these moral laws which are co-existent with eternity, and which are calculated to produce the highest possible happiness in this stage of our existence. These laws are equally operative and obligatory upon the whole human race; and tho there may be some slight variations, occasioned by difference of climate and education; yet such is the agreement of mankind in respect to them, that they may be said to be general in their extent, and universal in their operation. Yet as man was not intended in the commencement of his existence, to be a perfect being, but to progress from stage to stage, towards perfection, till he should become qualified for complete felicity, and a full comprehension of the glories of his creator, we find that he is sometimes actuated by mischievous propensities and wicked desires, that impel him to a violation of the moral law, and the commission of injuries to his fellow-creatures. If some permanent principle were established, that coerced mankind to a perpetual observance of the moral law, they would be in a state of peace and safety, but the imperfect observance of it, has exposed them to every species of danger, insult, and injury, and has rendered necessary for their preservation, that social principle which is wisely implanted in the human mind.

Man when alone, is a feeble defenceless being—incapable of asserting his rights, and redressing his wrongs. The Creator has therefore instamped on his nature the love of his fellow men, invested him with social feelings, and impelled him by the strong principle of self-preservation, to enter into a state of society. The instant we contemplate man as a social being, we behold the germination of that principle that prompts him to adopt and observe those rules and regulations which are necessary to secure the rights of individuals, and preserve the peace and good order of society. Those rules constitute the civil law, and are the subject of these researches. A more complete and accurate definition will be given of law, as soon as we have considered civil society, and civil government.

Such is the extent of the globe, that it is impracticable to unite all mankind under one government. A number of distinct and independent

dependent communities have been erected. Their relation to each other is the same as that of individuals in a state of nature. Where a community has sustained an injury from another, it must be its own judge with respect to the recompence to be demanded, and must depend on its own resources to procure redress. In the intercourse of nations, by common and universal consent, certain general rules and principles have been adopted, that are founded on the law of nature, and denominated the laws of nations.—

• This is defined to be the science of the law subsisting between nations or states, and of the obligations which flow from it. *b* Justinian says, “the law of nations is common to the whole human race.” The exigences and necessities of mankind, have induced all nations to constitute certain rules of right.

When man opens his eyes upon the wonderful, sublime and magnificent objects that surround him, he is convinced that there is some supreme intelligent power that called them into existence, and that governs universal nature. A consciousness of his own weakness and dependance, the pain and misery to which he is subjected, lead him to implore the mercy and favour of the invisible power by the fragrant incense of sacrifice, by the humble strains of adoration, or the pious supplications of a penitent heart and contrite spirit. Man is a religious being. In every stage of society, and in every country on the globe, this truth has been demonstrated. From the Tartar who roams through the wilds of Asia, and the Indian who traverses the woods of America, to the philosopher who with his telescope surveys the stellar worlds, or in his laboratory, explores the occult qualities of matter, the power of religion encreases, in proportion to the encrease of knowledge. Human laws, can neither create or annihilate it. Mankind will never cease to be religious, till they cease to exist. It would be a curious subject to investigate the wild systems of mythology, which have been adopted by nations guided by the light of nature, unaided by divine inspiration. But it is sufficient for our purpose to remark, that in this country we have the blessing of a religion, that while it opens the door of salvation, and guides to immortal felicity, is supported by such indubitable proof, that we must disregard human testimony,

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*a* Vattel, Law of Nations, 2. *b* Jus autem gentium omni humano generis commune est, nam usu exigente et humanis necessitatibus gentes humanæ jura quædam sibi constituerunt. Just. Inst. L. I. T. 2.

and reject the evidence on which all our knowledge of past transactions is grounded, if we doubt its truth, or deny its divinity. The christian religion derives the highest credibility from containing a system of morality, infinitely superior in point of excellence and purity, to the theology of Greece and Rome, and the philosophy of Plato and Cicero. From this religion, is derived the revealed or divine law, and the observation of it, is sanctioned by future rewards and punishments.

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### SECTION THIRD.

#### OF CIVIL SOCIETY.

**W**E have considered man as a sentient, rational, active, and moral being. We are now more especially to consider him in his social capacity. To obtain a thorough knowledge of this subject, it is necessary to view mankind when connected with each other, but independent of any government ; which political writers call a state of nature.

It cannot be expected that we can find any nation in a state of nature, tho some savage clans and tribes, are but little removed from it. But for the purposes of the present enquiry, it is immaterial whether this state be ideal, or actually existing. We can easily imagine what mankind would be, in such a state, and thence infer their rights and privileges.

In a state of nature, all men possess the inestimable privilege of freedom. They are equal in point of rank. They know no distinction, but what arises from superiority of bodily strength, and intellectual capacity. They are bound to yield obedience to the commands of no superior, and to conform their actions to the laws of no government. The moral law only, has any obligation upon them, and to this they owe the most perfect obedience. They have an indisputable right to do every act which they please, in the pursuit of their own happiness, that does not contravene the moral law, nor injure any of their fellow creatures. The rights of personal security, personal liberty, and private property, they are entitled

entitled to in their fullest extent. When any person sustains an injury, he appeals to no tribunal for redress, he is the sole judge of the injury, tho his own case ; his own arms avenges the wrong, and chastises the offender. If mankind were under the perpetual influence, and invariable direction of the moral law, how happy would their situation be in a state of nature : there would be no necessity of the interposition of human laws. But while conscience dictates to them to pursue the paths of virtue, and warns them against the practice of vice, there are many individuals who are actuated by certain propensities, to wrong their fellow-men, and infringe the rules of morality. To check, restrain and punish this injustice, every individual is left to the strength of his arm, and the powers of his mind. So great is the difference among mankind in this respect, that the conflict is very unfair and unequal. The weak will always fall a prey to the strong ; the cause of justice will be disregarded, the powerful will triumph in the practice of mischief, and injustice,—the weak must suffer a constant repetition of injuries without a possibility of redress. This points out the miserable condition of man in a state of nature, and we may rationally expect to find him endowed with some principle to supply the defect.

Why immutable laws were not instamped upon the mind of man, that should certainly direct him to a course of conduct productive of the greatest possible happiness, is a mystery far beyond human comprehension. It is however probable, that in the system of nature, and in the eternal plan conceived in the divine mind, for the display of his glory, it became necessary to create such an order of beings as man, to compleat that infinite variety that distinguishes the works of creation. He is endowed with all the principles that are necessary to constitute his character. While he applauds the practice of virtue, we find that the unguarded impulse of passion, the prospect of temporary pleasure, or the inclination of a wicked heart, may lead him to do wrong to his fellow creatures, and disturb their peace and repose. But lest this perpetual warfare should put an end to the human race, they are inspired with a love for each other, and are endowed with principles, that lead to unite in society for mutual protection, and defence. The mutuality of affection between individuals, the fear of danger, the

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incapacity

incapacity of defence, and the wants which they cannot supply, in a state of nature, induce them to associate together, and may be considered as the basis of civil society.

A state of society when contrasted to a state of nature, must not be considered as merely artificial, and therefore unnatural. The truth is, that the social state is perfectly congenial to the feelings of the human heart. Man is a gregarious animal, and the principles of his nature lead him to the formation of social connexions.

The act of uniting in society, is called the original compact, or social contract, and is supposed to be a voluntary agreement between individuals, by which they form the constitution of government, and secure the enjoyment of political liberty, and the pursuit of private happiness. Governments that have been established by force do not admit of this idea: but such is the origin and foundation of all free governments, tho generally it is impossible to find any records of the formation of the social compact. In America however, many instances of that nature have taken place. At the dissolution of our connexion with Great-Britain, tho we could not be literally said, to be in a state of nature, yet the states which had been directly dependent on the British crown, were so in a political point of view, and they proceeded to enter into social compacts, and adopted constitutions for their government. The constitution of the United States, is the most illustrious example of a government founded on the voluntary contract of the people, that the page of history has ever recorded.

Mankind when they enter into a state of society, resign to the community a certain portion of their natural liberty, to acquire civil liberty. They resign a part of their natural rights, to acquire social rights. Natural liberty consists in a man's having the power to do whatever he pleases, uncontrouled by any superior, and regarding only the moral law. Civil liberty, consists in a person's having the power to do whatever he pleases, consistent with the laws to which he has voluntarily subjected himself.—The object of a man in surrendering to the community any portion of his natural liberty, is to obtain compleat protection and security for political liberty. He does not therefore consent to the  
imposition

imposition of any other restraint upon his conduct by the government, than what is necessary to secure and preserve his social rights.

We may therefore establish it as a maxim in legislation, that the rule to be adopted in enacting laws, must be to restrain no acts but those which tend to the injury of individuals and the dissolution of government. Every law that deviates from this rule, is arbitrary and unjust, and reduces the people to political slavery. Every government that adopts this rule secures to the subjects political liberty.

Every citizen owes obedience to the laws of the state, and is entitled to protection and security in his life, liberty, and property. The duties of protection and allegiance, are reciprocal.

Where civil government is once formed by the operation of natural principles, we find its support is derived from the same source. Man will as soon put an end to his existence, as withdraw himself from society, or cease to maintain it. The all-wise creator, has given mankind feelings that lead them to perform the course of conduct which he has designed. These principles result from the necessary constitution of things. Man when alone is feeble and defenceless, incapable of protecting and defending himself. He is constantly alarmed with fears of danger, and surrounded with wants which he cannot supply. But when individuals unite together, they become capable of mutual protection, and defence, and of supplying all their wants. From the combined and collected strength of the whole community, each individual derives a security, which he cannot obtain when alone and separate. The strongest of all motives, therefore, self interest and self preservation, co-operate to strengthen the bands of society. The happiness of men depend upon their connexion and union with their fellow creatures. Man banished from society is a miserable, melancholy being. In the company and conversation of his friends, he obtains all the pleasure that renders life worth enjoying. We must eradicate from the human heart, the desire of happiness before man will cease to adhere to the community.

Political writers have generally entertained an idea, that men when they enter into a state of society, sacrifice, or give up to the community

community some portion of natural rights, to acquire protection and security for the remainder. A late writer on government whose talents command our respect, and whose exertions to communicate just sentiments respecting government, merit our approbation, has pointed out the error of this general proposition, and has advanced the principle, *a* "that the rights of man are relative to his social nature, and that they exist only in a coincidence with the rights of the whole, in a well ordered state of society, and civil government : *b* that society in the administration of right, grants nothing to any of its members, and that every man is a proprietor, and draws on the capital as master of right." His opinion seems to be, that man makes no sacrifice when he enters into the social state, and that it is congenial to his nature.

The position that when men enter into the social state, they give up some portion of natural right, to acquire security for the remainder, is manifestly erroneous. To suppose that men by uniting in society, only obtain security for the rights they have reserved, is contrary to fact. To say that our natural and our social rights are the same, perhaps, is not perfectly correct. Some confusion probably has arisen with respect to this subject, from not annexing accurate ideas to the words, which have been used. To contrast the social state, to the natural state, as tho the former was artificial, and the latter natural, is contrary to truth. No principle of human conduct, is more perfectly natural than that which prompts mankind to associate together for mutual benefit. The words social, and natural, are not therefore to be considered as designating opposite states, in which mankind are placed. They are only to be considered as two distinct states in which they may be contemplated to ascertain the rights and character of man.— I doubt whether a state of nature ever did, or can exist ; but I can imagine such a state, and thence infer the advantages derived from a union in society.

In a natural state, the moral law would be the only rule of conduct. Admitting that mankind would pay a complete regard to that law, what would be the consequence ? It is easy to observe that they would not remain like some savage tribes, in a rude uncivilized

*a* Chapman's principles of government, 77.      *b* Ibid. 112.

civilized state : nor would they live alone unconnected with each other. They would build towns and cities, improve in agriculture, manufactures, and commerce, and obtain all the pleasures of society. There would be no necessity of a code of laws to regulate their conduct, or of a government to carry them into execution. They would be able to attain under the invariable influence and direction of the moral law, all that happiness which could be attained in a well regulated government. Human industry, unshackled by laws, might be exerted in every direction, and extended to the highest point of improvement. There would be no restraint upon the conduct of man, but the moral law.

But supposing, that men would not pay a perfect obedience to the moral law, and yet did not carry their injustice to an extreme, which required the strength of government to suppress it. The consequence would be, that whenever an individual sustained an injury from the misconduct of another, he would have a right to be his own judge, to ascertain the recompence to which he is entitled, and the strength of his own arm must carry his decree into execution : he would be bound however to govern his judgment by the principles of moral justice.

But on actual experiment, it is found that men will not regard the dictates of the moral law, and that individual strength is insufficient to repel the violence of injustice. It is therefore impracticable for them to exist in a state of nature, and they are under the necessity of combining together for mutual protection and defence. This is the operation of a natural principle. But when men have arrived to the social state, when they have adopted a civil government, how are their rights varied from what they are in the natural state ? Every individual gives up the right of judging in his own case, and avenging his own wrong, to the community. In this respect, natural right is varied. In consequence of this he acquires from the community, a right that his claim for the reparation of any injury, he has sustained, shall be ascertained by known and just principles, and that the whole strength of the community shall be exerted to do him justice. This is a right which he had not in a state of nature. It is a right which he acquires as a member



ber of society. In a state of nature, no man is bound to aid and assist another in the prosecution of justice, or the defence of his rights unless he pleases. But in the state of society, every individual becomes obliged to exert his strength, in obedience to the order of the community, for the benefit of an individual, or for the preservation of public tranquillity.

Every member of the society submits to numerous restraints upon his conduct, which are not required by the moral law, or in the natural state, for the purpose of vesting in the hands of government, the power of furnishing him complete security and protection.—We submit to many formalities respecting contracts, which are the offspring of positive, and not of natural law, to render our property secure. We consent to be restrained from doing many acts which are innocent in themselves, and to be obliged to do many acts which the natural state does not require, to obtain complete protection for the rights we mean to enjoy. In consequence of this, we acquire many rights, and advantages of a civil nature, which could not be obtained in the natural state. Hence it is evident that there is a distinction between natural and civil rights, as they may be called more properly, than social, because a person may enjoy social rights, in what is properly called a state of nature. Natural and civil rights cannot be enjoyed at the same time. We must give up the one to attain the other. But the natural rights which we sacrifice, are of but very little value, when compared with the civil rights we acquire in a free and well regulated government. Indeed they are of little value, because they are difficult to be exerted, but the civil rights are of immense value, and are capable of being realized.

This leads us to a correction of that opinion which has been maintained by so many philosophers, that men resign part of their natural rights, to obtain security for the remainder, by substituting the proposition that men give up to the community, a part of their natural rights to acquire civil rights. From this same principle it follows, that the opinion that society in the administration of right, grants nothing to any of its members, is not well founded. For in the civil state, which is deemed the same as the social state, by the administration

administration of the government, the members do acquire certain positive rights, which they can enjoy only in a civil state, and which are therefore to be considered as the gift and the offspring of social institutions. It is in virtue of his being a member of the society, that a man is a proprietor, and has a right to draw on the capital, and not in virtue of any natural right.

Men at their birth are all vested with equal rights, but are endowed with unequal powers. There is a great difference between their intellectual, as well as corporeal faculties, which is the origin of the inequality of mankind. The man who has superior strength of body, or powers of mind, must take a correspondent rank in society. The man who possesses uncommon talents for accumulating property, will grow rich, while the opposite character, with equal advantages will remain poor. Those who are blest with the powers of eloquence, or talents to render them distinguished in the various branches of literature, will acquire a fame that cannot be reached by men of moderate capacity. Hence in the nature of man, we find the foundation of that difference of condition, which is every where established. There is a gradation in human powers from the highest to the lowest, which has produced a correspondent gradation in the ranks of society. But whether men possess the greatest, or the smallest talents, they have equal claims to protection, and security in their exertions, and acquisitions.

It is idle to lay it down as a general proposition that all men are born equal. It is contrary to the truth of the fact, and the design of the creator. The difference of genius by which they are qualified for different occupations, is essential to the existence, and conformable to the nature of man. But the real misfortune is, that this natural inequality among mankind, has been directed to establish an artificial inequality, which has been the source of serious evils, and complicated inconveniences. The establishment of hereditary honors and privileged orders among the nations of Europe, and the division of the Hindoos, into four tribes, or castes in Asia, by which birth, and not superior accomplishments, has placed certain persons in the highest ranks in society, to the exclusion of those who possessed the requisite talents, may be considered as a violation of

natural right. It is in a country where such artificial distinctions of rank are established; that people are to complain of inequality, and attempt a reform. But in a country where the laws know no distinction of rank, and furnish equal security to the exertions of the various extent of human powers, we have no occasion to trouble ourselves with idle speculations respecting equality. We shall find that the operation of these equal laws will be the establishment of a gradation of ranks, and a variety of conditions, essential to the existence of society, and productive of the greatest happiness.

An attempt to reduce all men to a state of equality would be a violation of the laws of nature, and such a project could never be carried into effect. The man who possessing feeble powers of mind, but great strength of body, acquires by constant labour the means of subsistence, can find no fault that a man possessing great strength of intellect, with feeble powers of body, should acquire by his own exertions immense wealth; for such is the law of our being, and such will be the result of things, where society grants equal security to the exertions of different capacities. But this is counterbalanced by the consideration that human happiness is not unequal in proportion to the inequality of condition. Let not those then who are placed in what is deemed the unfortunate grade of poverty, repine at their fate, or attempt to subvert the order of things, for in the humblest rank to which men are assigned by providence, this consideration ought to silence every murmur, that human felicity is not proportioned to dignity of rank, or abundance of wealth, but is distributed with an equal tho sparing hand to every grade, and that there is as much genuine bliss to be found in the lowly cottages of the poor, as in the palaces of princes, or on the thrones of kings.

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#### SECTION FOURTH.

#### OF CIVIL GOVERNMENT.

**T**O understand the nature of laws, we must know the principles and forms of government. Upon a subject so extensive and important

important, it is difficult to condense our observations into proper limits. In an investigation so sublime and pleasing, it is difficult to set proper bounds to our enquiries. In an elementary treatise upon jurisprudence, we must reduce our remarks to a narrow compass.

Mankind, when they enter into the social state, and form the original compact, adopt some form of government.

There are four simple, uncompounded forms of government, to which all others are reducible. The first is where the supreme sovereign power is vested in the people, who collectively assemble for the purposes of legislation and government : this is called a democracy. The second is where the sovereignty is lodged in the hands of a council or senate, consisting of the principal persons of the state, either in respect of nobility, capacity, or probity : this is called an aristocracy. The third form is where the whole power is vested in the hands of one person, which is called a monarchy. The fourth is a government by representation, or a representative republic, where the sovereignty is lodged in the hands of certain representatives, elected by the people, and to whom they delegate certain constitutional powers to promote the public welfare.

These four different forms may be combined and modelled into a thousand different governments.

Perhaps a pure and unmixed democracy has never existed in any age or country. Those which have the nearest resemblance to it, will be found to have some tincture of aristocracy. The Areopagus of Athens, and the Senate of Rome, were a constant and powerful check upon the democracy. It may generally be remarked, that the more a government resembles a pure democracy, the more they abound with disorder and confusion. That the people will frequently commit the most astonishing acts of cruelty and oppression, that they have all the relish for war, and ambition for conquest, that distinguish monarchs, and that the consequence of their violence and contention, is the establishment of a despotic government. These facts are most fully verified by the histories of the Grecian and Roman republics.

Many pure aristocracies have existed, such as Venice, the United  
D 2 Netherlands,

Netherlands, and many of the Swiss Cantons. Where certain well-calculated checks have been instituted, the community have sometimes enjoyed a tolerable share of political happiness, but in general the happiness of the many has been sacrificed to the happiness of the few.

Monarchies may be absolute, or limited. Absolute monarchies, where the will of the prince is the supreme law, and the lives and estates of his subjects are at his disposal, have existed in some of the oriental countries: but the monarchies of Europe are limited by certain forms of proceeding, and certain long established customs, which controul the will of the monarch, and temper the severity of the government.

Of mixed governments, Sparta and Great-Britain constitute the most illustrious examples. Sparta may be considered as a compound of monarchy, aristocracy and democracy. There were two kings, a senate, and an assembly of the people. In Great-Britain there is a king, who has an hereditary right to the crown; a house of lords, who are hereditary nobles; but the house of commons being the representatives of the people, cannot be considered as resembling a democracy, but a representative republic. This circumstance constitutes the superior excellence of this government. They have combined the advantages of monarchy and aristocracy, and for the rashness and instability of democracy, they have substituted the advantages of a branch of the government by representation.

A representative republic may be constituted in different manners. The sovereign authority may be collected in one center, or a single body of representatives, according to the French theories of government, or it may be vested in a legislature consisting of three distinct branches, like the constitution of the United States, and several of the state governments. The United States have exhibited the first fair example of a representative republic, with a legislature, composed of three branches. It appears the best in theory of any government, that has been instituted, but time alone can determine how well it is calculated for energy and duration. The government of the United States is singular in this respect, that there are state legislatures to regulate the interior local concerns of the several

several states, while the federal legislature regulates the general concerns of the republic. The blending of these different governments, for different purposes, seems to be well calculated for an extensive country, and if the line of demarcation between them, can be so accurately ascertained, as to prevent any clashing of jurisdiction, it will promote the happiness of the people, and strengthen the hands of the government.

Nothing can be more erroneous than the opinion that the government of the United States is a democracy. It has not a single feature of that form of government. The people have no power but that of electing the representatives, which they have not in a democracy ; they can not do a single act in framing the laws or administering the government, any more than they can in the most despotic government on the globe. Some have called it a representative democracy ; but this is a contradiction in terms, and as improper as to call it a democratic aristocracy ; for democracy signifies a government by the people themselves, and a representative government is where the government is not by the people, but by representatives for that purpose elected by the people, and to whom they have delegated the power of administering the government. Let us only consider our government in this light, and many groundless prejudices will be removed. The people are invested with the right of electing their rulers, which is no part of government ; and the administration of the government is in the hands of representatives of different descriptions elected by the people. Here are neither democracy, aristocracy or monarchy. It is a pure original form of government.

An historical view of the progressive, but gradual improvement of government, from the earliest to the present time, would be a subject of the noblest speculation—But our plan confines us to the utmost brevity.

The ancients were far behind the moderns in their improvement in the profound sciences of government and policy. They had no idea of securing the rights of the different orders in society, and moderating the rashness and impetuosity of a democracy, by a  
fair

fair and equal representation of the people. \* Tho they adopted a variety of expedients to check the power of the different orders, yet they never discovered the true principles of balancing them by an equal distribution of the legislative power among three branches, and separating it from the executive and judiciary.

† In the heroic ages of Greece, when the people were in a pastoral state, they adopted forms of government of a democratic nature; investing the military command in a chief, in times of war. As they progressed in civilization, and agriculture, their chiefs gradually extended their power, till the people resumed their rights and established in the little territory of Greece, a number of republics, of an aristocratic, and democratic nature. In all, an imperfect effort was made, to balance the contending interest of the nobles and the people, and the institutions of Lycurgus, and Solon, have immortalized their names as legislators in the page of history. Had that people, who have exhibited some of the boldest efforts of genius, and the sublimest flights of imagination, hit upon the plan of a representation of the people, and a division of the legislature into three branches, they had not been a prey to anarchy and intestine wars, while their governments continued; nor had their country now been subjected to the deepest wretchedness and misery, under the iron hand of Turkish despotism.

The Greeks had no just idea of preserving the independence of the several states and kingdoms of the world, by maintaining the balance of power between the whole. The Amphyctionic council was but a flimsy expedient to preserve their liberties against intestine commotion and foreign invasion. They soon acknowledged the superiority of the Macedonian power, and suffered Alexander the great, to conquer a principal part of the civilized world, without any attempt to form a combination to check an enterprise so dangerous to all the nations of the earth. His premature death prevented him from securing by the regulations of peace, the advantages he had acquired by the victory of his arms, & and after

\* Adam's defence of the American constitution, Vol. 1. I am bound to acknowledge that I am indebted to this work for many ideas and observations. The eminent author has not only exhibited a thorough and accurate knowledge of his subject; but he has detailed a beautiful theory, illustrated by the experience of past ages, that may be considered as a perfect standard in the science of government.

† Gillies history of Greece, Vol. I. c Roll. Anc. III.

ter a long series of bloody wars, his conquests were divided by three of his captains into the despotic kingdoms of Syria, Egypt, and Macedon. All kingdoms established by a leader at the head of his army, will partake of that military despotism which is necessary for the discipline of soldiers.

During this time, the republic of Rome was extending its conquests over the neighbouring nations, in a manner of which history furnishes no other example. In the first dawn of the Roman history, we find the people under the obedience of kings, whose abuse of power, soon provoked them to reclaim their natural rights, and establish a republican form of government. Tho the want of a balance of power, between the senate and the people, opened the door for perpetual discord and contention, yet their military spirit, and their ambition of empire, led them to achieve the conquest of all the civilized nations of the earth, and the potent kingdoms founded by the successors of Alexander, dwindled into provinces of the Roman empire. But the feeble and jarring powers of the government, were insufficient to guard, protect, and defend a state of such vast extent. Had the powers of the senate and people been equipoised, and all the provinces fairly and equally represented, perhaps the Roman eagle would at this time have spread its wings over all the habitable countries on the globe. It is no wonder, that the exalted virtue and sublime eloquence of Cicero could not stem the torrent of universal corruption, and restrain the licentiousness of a populace, who in the wealthiest city in the world, had in a collective body the supreme command of an empire. Rome was ripe for a revolution, when Julius Cesar, the greatest hero of antiquity, who by a ten years series of victories; had conquered the fierce nations of Gaul, descended from the Alps, passed the Rubicon, and on the plains of Pharsalia, triumphed over the arms of Pompey, and trampled on the liberties of his country. But a Roman was found, who by the boldest exertion of patriotism dared assert the cause of liberty, and punish the usurpation of the tyrant. In the capitol, in an assembly of the senate, the dagger of Brutus avenged the insult done to his country; but the death of Cesar neither expiated his crime, or restored the liberty of Rome. It opened anew the sources of discord, and after oceans of Roman blood



Blood were shed, Augustus laid the permanent foundation of a despotism, that enabled his successors to insult the dignity of the world, and sport with misery of the human race.

In the fifth century, the eastern and western divisions of the Roman empire, held in servile subjection, the fairest portion, and best cultivated part of Europe, Asia, and Africa. The long, constant, and uniform operation of arbitrary power, and the blind submission to the will of a sovereign, enervated the powers of genius, and checked the flights of imagination. The matchless eloquence of a Cicero, no more resounded in the capitol, to defend the rights of man. The harmonious numbers of a Virgil and a Horace, no longer polished the manners, and improved the virtues of the people. The laurel of fame, and the tribute of applause, were bestowed on the vile sycophants, who composed the most hyperbolical strains of adulation. The feeble efforts of genius demonstrated the shackles that were rivetted on the human mind. The world was prepared for a revolution.

At this period, the uncivilized nations issued from the forests of Germany, subverted the Western empire, and produced the most important revolution recorded in the annals of history. They changed the face of the earth, new manners and customs were introduced, new forms of government established, and new codes of law promulgated. From this revolution, is derived the noble and romantic heroism of chivalry, which produced so great a difference of manners, between ancient and modern times; and the feudal system which led the way to the discovery of representation in government, and the balancing the different orders by three branches in the legislature. A revolution of such extensive consequences has long been a subject of speculation to the literary world, and can never be too much contemplated or too fully investigated.

All unpolished nations, in that simple state of society which is denominated pastoral, are led by the dictates of nature, to adopt similar governments. Survey mankind through every period of history, and extend the eye to every nation on the globe, the Grecians, the Romans, the Germans, and the Tartars, and this truth will be fully demonstrated.

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Gibbon's history Roman Empire. Robertson's hist. Charles, V. vol. 1. Home's hist. Eng. vol. vi. Gibbon's hist. Rom. Emp. Millar on ranks in Society. Millar's hist. view Eng. Gov. Sullivan's Lectures.

The manners of the Germans, several centuries before their invasion of the Roman empire, were described by the masterly pen of Tacitus, who deserves the title of the philosophical historian. The leading feature of their government, was democracy. In an assembly of the freemen, the supreme power was lodged. They elected a chief to preside in their national councils, and conduct their military enterprises. This assembly of the freemen was continued after they had made permanent settlements in the conquered countries, and established on the ruins of despotism, the outlines of free constitutions. But I must confine my enquiries to that kingdom, which alone from the confusion of the feudal system, extracted a form of government, that has been the admiration of mankind.

In the middle of the fifth century, the Romans incapable of supporting their tottering empire, against the violent shock of the invaders, left the inhabitants of the southern part of the island of Great-Britain, enervated and corrupted by the arts of peace, and the shackles of slavery, a feeble and defenceless prey, to the fierce and warlike inhabitants of Caledonia. Upon the invitation of Vortigern, the British king; the Saxons left the wilds of Germany, and came to their relief. The Picts, and Scots fled before their victorious arms: but the Britons experienced the same treatment from their allies, which they dreaded from their foes. After a bloody struggle, seven Saxon chiefs erected their thrones. In the eighth century, the superior valour and wisdom of Egbert, united the country under the power of the Anglo-Saxons, from whom the English, and England derive their name. The Saxon conquerors introduced their own institutions. The king was the chief, and the supreme power was vested in the national council, called the *Wittana gemote*, consisting of all the freemen of the nation. In the distribution of the lands, the immediate retainers of the king held by feudal tenure, and the freemen by an allodial title.

When England submitted to another conqueror, and William the Norman, by the decisive victory of Hastings, gained an indisputed title to the crown, he introduced into England the feudal tenures, with the rigorous and oppressive consequences annexed to them on the continent, where all the allodial estates had been converted in-

to feuds. The allodial proprietors surrendered their lands, and became vassals of the king. The *Wittana gemote*, assumed the name of parliament, and was composed of feudal barons. The jealous nobles, firmly resisted the efforts of the Norman kings to establish an arbitrary sway, and on the plains of Runny-Mead, extorted from John, the *Great Charter* which secured the independence of the parliament, and the liberties of the nation. In the progressive improvement of the state, and from the more equal distribution of property, the persons who had a right to a seat in the great council became numerous, and the poorer class were unwilling to bear the expense of attendance. The kings were desirous that the lower order should attend the parliament, for the purpose of counterbalancing the power of the great and wealthy barons.—Hence originated the election of knights of the shire and burgesses, to represent the counties and towns, by which their privileges were secured, and the expensive attendance of the whole was saved.

The difference of rank between the nobles, and the representatives, and the different rights to their seats, naturally led them to meet in different apartments, and form separate deliberations and determinations. The king as the chief of the nation, naturally assumed the executive power: the judges by their uniform decisions, established a permanent system of common law, which drew the business of that nature from the parliament, to their tribunals, and enabled them to assume a regular jurisdiction over all the controversies of the people.

In this accidental manner originated, the principle of representation, the balancing the orders of the people, by three branches in the legislature, and the separation of the executive, legislative and judicative powers. The most capital improvements that ever had been made in government.

The improvements of the English nation, in the science of government, were by our ancestors at the time of their emigration transplanted to America. The greater part of that country which now composes the United States, was settled by private adventurers, without the aid of the crown of England. On their arrival in the wilderness, surrounded by ferocious tribes of savages, and exposed

to the horrors of hunger and cold ; they reverted to a state of nature, and had the right of erecting such form of government as they pleased. They were naturally led to copy as nearly as difference of situation and manners would admit, the institutions of the country from whence they originated. A governor, council, and representatives, bear some resemblance to the king, lords, and commons of the English parliament. As they acknowledged allegiance to the British crown, no person could claim the pre-eminence of royalty. As none of the nobility had any inducement to exchange the luxuries of a cultivated country, for the enjoyment of religious liberty in a wilderness ; there were none to claim the privileges of noble blood. Equal in point of rank, they were naturally led to fill every department with members elected from themselves. By this accident, it was reserved for America to give the last improvement to the form of government, by introducing the election of every branch from the body of the people. The governor, council, and representatives, raised to office by the suffrages of their equals, were vested with the supreme power of the state : acknowledging the authority of the British crown, they presented these free constitutions to the king, to be secured by the sanction of a royal charter. Their resemblance to the English constitution, and the contempt and indifference with which the little republics of America were beheld in England, induced the king to grant them charters, containing such extensive rights and privileges, as enabled them to resist the tyranny of his successors, and effect a revolution, which has fixed a new era in the history of government, and policy.

The act of independence passed by Congress on the ever memorable 4th of July, 1776, dissolved the political connexion between this country, and Great-Britain, and furnished the people with an opportunity of reaping the full advantages that naturally flow from the spirit and freedom of their governments. As soon as peace had healed the wounds of the country, bleeding from an eight years struggle in the acquisition of sovereignty, and given the people an opportunity to reflect upon their situation, the fruits of their superior knowledge in the science of policy became conspicuous. Convinced of the insufficiency of the confederation, to render them a rich, a happy, and respectable nation, they exhibited to the world

an unparalleled example of public spirit, in adopting the present constitution of the United States. In this constitution the principles already discovered in America, are displayed in their full extent and meridian splendor. We here behold all the ingredients, that constitute a good government. The balance of power maintained by three branches of the legislature. A separation of the legislative, executive and judicative powers, so as to operate as checks upon each other. A qualified negative on the legislature vested in the executive, sufficient to guard against any encroachment. Every branch of the legislature, and the supreme executive magistrate, ultimately elected by the people. The judiciary rendered independent. The representatives sufficiently numerous, and the empire properly districted, so as to give them an opportunity to be well acquainted with the interest of every part of the community. Their elections sufficiently frequent to give their constituents an effectual restraint upon them. The people are possessed of all the power, that can safely be lodged in their hands. The republics of Athens and Rome, have demonstrated the danger of trusting the supreme power in large popular assemblies. The rights of electing the legislature and the supreme executive, may safely be vested in them in their collective capacity, and this will be an eternal barrier to despotism.

In a country where the three ranks of a king, an hereditary nobility, and the people, were distinguished, as in England, and the object was to secure them all in their different rights, the English constitution was the best that human wisdom could devise: in a country, like America, where there is no distinction of ranks, the present constitution is the best that could be adopted. The great superiority of this constitution to the British, arises from the circumstance that tho' the supreme executive magistrate and senate are elective, yet their mode of election is so contrived, as to afford far more security and stability than result from the ensigns and trappings of hereditary royalty and nobility.

An hereditary monarchy is certainly preferable to an elective, because it prevents disputes about the succession. This constitution appoints

I speak of the general principles of the constitution. I do not mean to approve of the inequality of representation, and the test and corporation acts. Those disgraceful reliques of an intolerant spirit.

appoints a successor to the president, in case of a demise in office, so that there never can be an interregnum, nor a disputed succession. In the supreme executive and the senate, there is no danger that the right of birth will place in those offices persons who have nothing to boast of, but the merit and glory of their ancestors.

In a country where the laws and the manners admit of but one order of citizens, and where the people instead of meeting in a body are governed by representation, there may be a question respecting the propriety and the necessity of a senate in the legislature. As the constitution is framed for a number of confederated states, there is a peculiar propriety in a senate, for the purpose of maintaining the independence, and dignity of the several states. But in all countries where there is no distinction of ranks, several reasons will forever exist, that will justify the establishment of a senate, for one branch of the legislature.

\* In every age and nation, the natural inequality of mankind, arising from superiority of ability and virtue, has laid the foundation of a natural aristocracy. In a legislature composed of a single branch, the personal influence attendant on genius, merit, and learning, might enable the possessors to form combinations, and execute plans, dangerous to the liberties of the people. Remove them to a senate, (and such will be the characters of which senates will always be composed) and they lose the opportunity of inflaming popular assemblies, by the splendor of eloquence, and of persuading them by the arts of intrigue, to adopt rash and ruinous measures. This promotion will enhance their personal dignity, and lessen their popular influence. A seat in the senate, is a proper reward for the services of those persons who are by nature endowed with talents and dispositions to do good to mankind. Such an object may divert the ardent pursuits of ambition, from schemes less praise worthy and honorable.—But there is another reason far more weighty and important.

In every legislature, there is a perpetual propensity to enact too many laws, to attempt to regulate mankind, respecting matters that ought to be left to their own operation; different branches, will lessen the facility of making laws, and check the rage of legislation

\* Adams's defence of American Constitution.

lation so injurious to the community. A sudden whim or popular clamor, may impel one branch to enact impolitic laws, which the other not being under the same influence, will reject. In two branches, where each have the power of originating, canvassing, and passing the acts, there will be much more deliberation, coolness, and caution, than in a single body. Each branch, will watch with a narrow eye the conduct of the other, and will examine every bill with the utmost care, and criticise it with the utmost scrupolosity : they will in this manner discover defects, point out inconveniences, and suggest amendments, that would pass unnoticed, in the hasty deliberation of a single body. Tho the government be by representation, which avoids many of the inconveniences of a democracy, yet if the representatives should be as numerous as public safety may require, it is possible that on some occasions, they may be impressed by popular impulse and clamor, and be led to all the excesses of democratic violence,—or if the representation be so small as to avoid that danger, then they may run into the opposite extreme of aristocracy. But where there is a senate, they will be able to controul the spirit of popular caprice, while the representatives will counteract any aristocratic influence in the senate.

If all the members of a legislature are liable to frequent changes, they will never have that firmness, energy, and experience, which are necessary for the public security. If all the members of the legislature, are permitted to continue in office for any long period, there is a probability of their being under a temptation, to encroach upon the rights of the people. To guard against these inconveniences, there ought to be two branches in the legislature : let the house of representatives be frequently elected, and the power of the people over them, will be sufficient to restrain them from any acts of oppression, and they will effectually check the senate. Let the senate be secure in their seats for a considerable time, and they will acquire sufficient firmness and energy, to counteract the rashness and imprudence of a house of representatives, and defeat the clamor and violence of the people. Secure in their places, they will be able to steer the ship with a steady helm, through the most boisterous storms, and wait till the return of a calm, for the approbation of their conduct.

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Many have indulged their fancies in attempting to discover a resemblance between the constitution of the United States, and the British constitution. They consider the president to answer to the king, the senate to the lords, and the representatives to the commons. The house of representatives being elected by the people, resembles the house of commons, but as the other branches are elective in this country, and hereditary in Great-Britain, the resemblance is very remote, and the principles of the government widely different. Our Government is original in its construction, and founded on a new basis. We have steered clear of the inconveniences of monarchy, aristocracy, and democracy. We have established a representative republic. We have imitated the British nation only in the adoption of the excellent principle of balancing the legislature, by distributing it into three branches.

The principle upon which the government of the United States is founded, is the interest and the happiness of the people. It is an appeal to their good sense, and it must depend for its support, upon a serious conviction of the necessity of subordination to government, for the security of their rights and privileges. It becomes therefore necessary to communicate to the people, just ideas respecting their own interest and welfare, and to impress and inculcate upon their minds, those principles which are essential to the preservation of civil liberty and good government.

A slight observation of human nature, will demonstrate that the remarks which Tacitus, and Voltaire have made respecting the Romans, and the English, are applicable to all nations. *That they can neither bear total servitude, or total liberty.* Another observation is equally evident, that man is extremely unwilling to submit to the exercise of authority over himself, but is very willing to exercise it over others. Kings are not the only persons that are pleased with the exercise of sovereign power. The people in some instances have manifested a keen relish for this business. The populace of Rome during the period of the republic, appeared to glow with all the ambition of conquest, and to be delighted in tyrannising over all the nations of the world. They wished to be free

*1 Nec totam servitutem, nec totam libertatem pati possunt.*

*2 Et fit aimer son joug a l'Anglois indompté,  
Qui ne peut servir, ne vivre en liberté.*

*Henriade. Liv. 6.*



free themselves, and reduce all nations to slavery. But while they exercised a severe authority over their neighbours, they kept Rome in perpetual tumult and confusion, because they would not submit to the necessary restraints of law. The consequence of this principle which is common to the human race, is that in the establishment of governments, if so large a share of liberty be allowed to the people, as seems to be necessary to constitute social happiness, there is great danger that they will abuse their liberty and subvert the government : if sufficient power be vested in the government to restrain the violence of the people, then there is danger that the rulers will abuse this power and prostitute it to the oppression of the people, and the destruction of liberty. To hit upon a form of government, which would safely steer between these extremes, and while it represses the violence of the people, guard against the encroachments of the rulers, is the great desideratum in civil policy. Such however is the difference of human character in different ages and countries, owing to the difference of climate and state of society, that it is not probable that any one constitution can be discovered, which will be adapted to every country, and productive of these important effects. In constituting a government, therefore, it is necessary to take into consideration the state of society and manners, and establish it on principles that are conformable to them. In this country, this principle appears to have been adhered to as far as circumstances would admit. Our constitution is the best calculated to steer between the extremes of anarchy and despotism, of any that has been adopted.

It may be said with truth, that by the constitution of the United States, the powers of the several branches of the government, are so restricted, and check each other in such a manner, that they can never gain the strength of despotism, or be exerted to the oppression of the people. The equality of representation, and the frequency of elections, give the people an effectual check, upon their rulers, and at the same time, place them in the most perfect state of responsibility. Their liability to be dismissed from office, for misconduct, and their obligation to obey the laws which they make, will operate upon them as a perpetual motive to consult the general good, and to acquire the favour and confidence of the people. In-  
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deed, there is every possible motive existing that can be, to induce the legislature of the United States, to exert all their talents for the public welfare, while no rational motive can exist to induce them to oppress, or injure the people. While the legislature is pure and uncorrupted, it will be impossible for either of the other branches of the government, to become despotic. A government that is founded upon the interest of the people can derive no pleasure from any consideration but the promotion of their welfare, and happiness. From this fair representation of the constitution of the United States, it is evident that it merits an unlimited trust, and that we may discard the demon of jealousy, which is a bane to the energy of government, and a poison to the confidence of the people.

It must be a pleasing consideration that we have discovered and adopted a constitution, which there is no probability will ever degenerate into tyranny. It would be a subject that would furnish the highest satisfaction, if we could trace in it those seeds of energy, which might spring up, grow, and arrive to such maturity, as to defend it from all the attacks of anarchy. If the general government has any thing to fear, it is to be apprehended from that quarter. While the wind is fair, and the sky serene, there is no danger but that the ship will sail with safety, but when storms, and tempests rise, is there not some danger that she may be wrecked on the rocks of disorder, or swallowed up in the whirlpool of popular violence? As we wish to guard against the approach of the remotest disorder, let us contemplate the difficulties we have to encounter, and prepare the remedy.

The state governments, like a chain of mountains, form a barrier against the encroachment of the general government—but may they not be converted into engines of opposition, to the most necessary measures? The pride of the large states, and their natural jealousy respecting the general government, may lead to some measures inconsistent with the peace of the union, for the purpose of maintaining their own importance. Could all the state governments be broken down, and then divided into states of proper and convenient extent, so as to provide such local regulations, as they can better provide than the legislature of the Uni-

ted States, and at the same time, not have so much power as to threaten or endanger the general tranquillity, it would probably be found a great improvement in our constitution.

But at present, perhaps, the greatest danger arises from the introduction of principles which are equally destructive of civil liberty and good government. While we are avoiding the extreme of absolute monarchy, which has been so oppressive to the people, there is a possibility of our running into the opposite extreme, and renouncing those principles which are the basis of a free government. So much has been said respecting the majesty of the people, the fountain of power, from whom government originates, and for whose benefit laws are enacted, that many begin to entertain an idea that it is incompatible with their sovereignty, that they should be governed. Hence it is a common phrase, that the people are the masters, and the legislature their servants. The consequence is, that the supreme power yet remains in the people, that they may make, and unmake governments as they please, and that revolutions are forever at their command : That the legislature are bound to obey their instructions, and watch and pursue their will. Admitting these principles to be true, it follows necessarily that the people are not bound to regard the laws unless they meet with their approbation. For nothing can be more absurd, than to require of the masters, obedience to the mandates of their servants, unless they think it proper. Every law therefore must be taken into consideration by the sovereign people, and when they have given them their sanction, they will obey them. The slightest attention must convince every body of the impracticability of executing a government upon this plan. It is a principle of disorganization, it subverts order and introduces anarchy. To avoid this extreme, let us consider the true principles of our government.

Our government originated from the people, and was instituted for their sole benefit. The impracticability of assembling a great nation to collect their will, rendered it necessary that certain persons should be elected, to whom the power of acting for the people should be delegated. This constitutes our government, to be a representative

representative republic, and an attention to this leading feature will unfold the basis on which it is established, and the principles by which it is to be executed. A government by representation, implies the idea that the representatives stand in the place of the people, and are vested with all their power, within the constitution. In the legislature, therefore, consisting of the representatives, is concentrated the majesty of the people, and the supremacy of the government. They are neither bound to obey the instructions, nor to consult the will of the people—but being in their place, and vested with all their power, they have a right to adopt and pursue such measures as in their judgment, are best calculated to promote the happiness and welfare of the community, in the same manner as the people themselves would act, if it were possible for them to assemble and deliberate on their common concerns. The reason why the instructions of the people are not to be regarded is, because it is impossible that the general sense should be collected: and even if that could be done, they have not those means of information which are necessary to qualify them to deliberate and decide. As to the instructions from any particular district, to the representative by them elected, they ought to have no influence, because when elected, a person becomes the representative of the community at large; he cannot therefore regard the instructions of his immediate constituents, but must consult the general good of the community and not the particular advantage of a district.

The only mode by which a legislature can act, is by a constitutional promulgation of laws. No individual has the power to command or compel the people to do any act, for his personal advantage; they can only be governed by general laws, virtually enacted by themselves, for their benefit, and which the individual members of the legislature, are as much bound to obey, as the people at large. The legislature therefore, can neither be considered as the masters or the servants of the people; they are their representatives, possessing all their power for certain purposes: all their laws are the will of the people, expressed in a constitutional manner by their representatives, and on that ground are entitled to an implicit and unqualified obedience. It is to the laws.

only that the people are subject ; so that in the strictest sense of the word, this may be said to be a government of laws and not of men.

The pride of a nation or individual, may revolt at the idea of yielding submission to the mandates of a monarch : but it cannot be considered as degrading to submit to the national will, expressed by its representatives. A man must derive a dignity and importance from the consideration, that he is virtually his own legislator : and instead of wishing to elevate himself above the laws, thus enacted, he will be the more strongly induced to yield them obedience.— When the will of the people has been thus virtually expressed by themselves, and actually by the representatives, it cannot be again submitted to them, to decide, whether they are bound to obey. Implicit obedience is an absolute duty. If they deem the laws improper, unconstitutional, or oppressive, they have the right to elect different representatives, who will repeal them. It is this power of the people over their representatives, that constitutes the security of their rights, and not the power of resisting the laws. If the people at large are vested with the rights of reconsidering and deciding upon the acts of the legislature, all the advantages of representation are lost. The general will of the community could never be collected, different districts would form contradictory decrees, and instead of law and order, there would be perpetual controversies and confusion.

There must somewhere reside a supreme power in the government : it cannot be placed in the body of the people, it must be in the legislature, which is constituted for that purpose, where the government is republican : but where it is despotic, it is in the hands of the monarch. In the first instance, the laws are grounded on the general good ; in the last, the will of the monarch only is to be consulted : but the laws in the first case ought to be deemed as absolute, as they are pretended to be in the last. Where the laws govern, let them be absolute, supreme, and sovereign.

## SECTION FIFTH.

## OF CIVIL LAW.

**I**T has already been remarked, that when man enters into a state of society, he resigns a part of his natural rights to obtain civil rights. Their security is the object of law, and bounds the power of legislation. Their enjoyment furnishes mankind with the greatest political happiness.

Civil law may then be defined, to be a rule of human action, adopted by mankind in a state of society, or prescribed by the supreme power of the government, requiring a course of conduct not repugnant to morality or religion, productive of the greatest political happiness, and prohibiting actions contrary thereto, and which is enforced by the sanction of pains and penalties. A few remarks will illustrate this definition.

Civil law is considered to be a more proper expression, than municipal law, a term made use of by the English lawyers, where the term civil law is usually by way of eminence, applied to the Roman or Imperial law—but as we have little connexion with the Roman law, and the term civil being commonly applied to our laws, I have restored it to its proper place, and have rejected the word municipal, which is too limited in its signification, to convey a just idea of this definition. It is a rule of action that is steady, permanent and universal, obligatory on the whole community, and adopted by mankind in a state of society, or prescribed by the supreme power of the government. It concerns them only in the social state, and points out the duties they owe to their neighbours, and to the community that protects them. \* The outlines are to live honestly, hurt nobody, and to render to every one his due. It derives its authority, not only from being adopted by the universal and immemorial consent of the people as the common law, but from the positive acts made by the supreme legislature, which is the statute law. It requires a course of conduct, not repugnant to morality and religion, but productive of the greatest political happiness, and prohibits actions contrary thereto. The usual definition is, commanding what is right, and

prohibiting

\* *Juris precepta sunt hæc, honeste vivere, alterum non ledere suam cuique tribuere.* Justinian's Inst. L. i, iii.

prohibiting what is wrong. But that is too indefinite and general, and more applicable to the moral than civil law. It is true that it is generally remarked by writers, that law is grounded on moral principles, but a few observations will evidence this to be an error. The sole purpose for which men unite in society, is the security of that portion of the natural rights which they reserve, and the civil rights which they acquire. The legislature, therefore, have no right to controul any actions, but those which are injurious to their rights, and endanger the existence of the state. It is evident that no government has adopted the moral law as a rule, because, in all, many actions are required to be done, which are morally indifferent, and many actions are not prohibited which are morally wrong. When it is acknowledged the government may omit the prohibition of immoral actions, and require the performance of indifferent, it follows as a consequence that they are guided by some rule different from morality. This rule is the political happiness of the people. It however must be considered, that no laws may contravene the principles of morality. When the legislature enact and publish laws, it is not for the people to examine them, and determine whether they will comply with them. They are virtually present by their representatives and assent to them when they are made. The laws therefore operate with the force of commands, and obedience becomes the duty of the citizens.

But the laws would be of but little validity, if they were not enforced by the sanction of pains and penalties. Human legislators bestow no rewards on the act of obedience, but the blessings which necessarily flow from it. They annex certain pains and penalties to every violation of their laws, which operate as motives on the mind, to enforce an observance of them. The measure of punishment is to subject the offender to an inconvenience greater than the advantage he can derive from the crime.

• Cicero has defined law to be a just command, directing what is right, and prohibiting the contrary. • Justinian has defined law, to be that which each nation has established for itself, and is proper to each state or civil society. • Blackstone has defined it  
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• Sancti iusta iubens honesta et prohibens contraria.

• Quod quisque populus ipse sibi ius constituit id ius proprium civitatis esse vocatur quod ius civile.

Just. Inst. lib. 1. tit. 2.

• 1 Black. Com. 44.

to be a rule of action, prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong. The definition of Justinian is too confined, and does not give an idea of the nature and extent of law. The definitions of Cicero and Blackstone seem to be grounded on the principles of the natural law, and do not reach the full extent of the civil law : and the definition of Blackstone is confined to statute law only, because it will comprehend those laws only which are prescribed by the supreme power of the state. In my definition, I have aimed to give a just idea of law in its fullest extent. It comprehends the statute, and the common law, and instead of limiting it to the commanding of what is right, and prohibiting what is wrong, I have extended it to the commanding or prohibiting of those actions which are morally indifferent, if it be necessary to promote the political happiness of mankind. This I consider to be the just bound of civil law.

The science of the law is grounded on certain first principles. These have been introduced by the statutes of the legislature, or have been derived from the dictates of reason, and the science of morals. On this basis, our courts have erected an artificial fabrick of jurisprudence, they have adjusted the various parts with the nicest symmetry ; and a deviation from any fundamental principle, deranges the whole superstructure. A judge therefore in forming his opinion, with respect to any particular case, must take into view the whole system of law, and make his decision conformable to the general principles on which it is founded. Nothing can be more improper than the practice of considering every case as standing on its own basis, and of deciding according to principles of right, which appear to be applicable to single cases. This will make the law uncertain, introduce contradictory determinations, and render it impracticable to systematize the principles of jurisprudence. But when courts take into view, the whole science, and square their decisions to the fundamental doctrines on which it is established, the consequence will be the introduction of that permanent uniform rule of administering justice, which is the ultimate object of government.



## OF THE LAWS OF CONNECTICUT.

### SECTION SIXTH.

#### OF THE LAWS OF CONNECTICUT.

**W**E come now to treat of the code of civil law, adopted in this state, which consists of two parts, the common law and the statute law, which require a separate consideration.

I. The Common Law derives its force and authority, from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature, by any express act, which is the criterion by which it is distinguished from the statute law. It has never been reduced to writing, but depends on the general practice and judicial adjudications of courts. The common law is derived from two sources, the common law of England, and the practice and decisions of our own courts.

1. I shall first consider that branch of the common law that originated in England. As our ancestors adopted the form of, and acknowledged allegiance to the British government, it was natural for them to admit and establish their laws, so far as it was consistent with the difference of situation. From this circumstance, our common law became chiefly of English original, and we must trace their jurisprudence, to ascertain the foundation and extent of our own. The revolutions that England underwent by the conquests of the Romans, the Saxons, the Danes, and the Normans, rendered their law of complex origin. After the Norman conquest, as soon as the government had assumed a regular form, the acts of parliament and the decisions of their courts, laid the foundation of their present code. They adopted a principle which is common to all nations, that when a court had solemnly and deliberately decided any question or point of law, that adjudication became a precedent in all cases of a similar nature, and operated with the force and authority of a law. This practice is founded in the highest wisdom, and produces the best effects.

It establishes one permanent uniform, universal directory, for the conduct of the whole community, and opens the door for a constant progressive improvement in the laws, in proportion to the civilization

tion of their manners, and the encrease of their wealth, while the legislature were passing acts for general regulations, the courts were polishing, improving, and perfecting a system of conduct, for the minuter subordinate transactions of life, which by the collective wisdom and experience of successive ages, have advanced to the highest pitch of clearness, certainty, and precision.

Courts however are not absolutely bound by the authority of precedents. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a subsequent court assumes the power to vary from or contradict it. In such cases they do not determine the prior decisions to be bad law ; but that they are not law. Thus in the very nature of the institution, is a principle established which corrects all errors and rectifies all mistakes.

The common law of England is a highly improved system of reason, founded on the nature and fitness of things, and furnishes the best standard of civil conduct. It is to be found in the adjudications of courts, which have been collected and published by judges, lawyers, and other officers. These adjudications are contained in year books which are extant, from the reign of Edward the second, till the reign of Henry the eighth, and then in reports which have been continued to the present time. Besides these reports, the common law has been improved by treatises of a systematic nature, which are held in high veneration and respect.—Such are the works of Glanville, Bracton, Britton, Fitzherbert, Littleton, and Lord Coke—But no writer on law has acquired greater distinction than Sir William Blackstone. He has reduced order out of chaos, and in his commentaries, exhibited a complete system of the laws of England. From this work the student will obtain a general understanding of this science, in a much shorter time than from any other author. His writings entitle him to the thanks of every country where English jurisprudence is practised, and have secured to him a fame that will last as long as the memory of those laws on which he has written shall endure.

But I ought not to omit the names of Reeve, Powell, and Espinasse, the most distinguished judicial writers of the present age,

Reeve has exhibited a view of the origin, progress and gradual improvement of the English law, with all the elegance of an historical writer, and all the precision of a lawyer. Powel has facilitated the acquisition of legal science, by arranging and systematizing in the clearest manner, all the learning scattered over a thousand volumes, respecting contracts, mortgages, devises, and powers; and 'Espinasse has answered the same purpose with respect to practice, by his digest of the law of actions. These writers are inferior to none of their predecessors in point of genius and knowledge, and have an equal prospect of immortal fame.

From this code we derive the greatest part of our common law. Our ancestors having settled this country without the aid of the British crown, were under no obligation to obey the government, or observe the laws of the country, from whence they emigrated. They might have instituted their own government, and promulgated their own laws. But prudence and policy dictated the measure, for the purpose of acquiring the protection of a powerful kingdom. This voluntary reception of the English laws, by the general consent of the people, is the only foundation of their authority. At the late revolution, when we were separated from the British empire, the general consent and approbation of the people, established the common law of England, as far as it is warranted by reason, and conformable to our circumstances, to be the law of the land. It has also been the practice of our courts to regard the decisions of the courts of Westminster Hall, since the revolution, where they relate to similar questions. But these have no intrinsic authority. They rest on their reasonableness and propriety. But this method deserves high commendation, because it furnishes our courts with the opportunity of incorporating with our law, all the improvements that are made in England.

There is no general rule to ascertain what part of the English common law is valid and binding. To run the line of distinction, is a subject of embarrassment to courts, and the want of it great perplexity to the student. It may however be observed generally, that it is binding where it has not been superseded by statute, or varied by custom, and where it is founded in reason, and consonant

to the genius and manners of the people. But the only certain rule by which the writer or the student can be directed, must be the practice and decisions of our own courts. As these have not been committed to writing, they can be learned only by attendance on the courts, where they are promulgated, which evidences the necessity of a treatise to point out how far, and in what manner our courts have adopted the common law of England. If reports had been taken of all the adjudications of our courts, the greater part of the common law might have been considered as adopted, and we should have had occasion to have recurred only to our own reports, for authorities. But as reports have not been taken, we are now obliged to search the English authorities for precedents and principles, which have been settled by our courts. This continues the difficulty of determining how far the English common law is binding. It is necessary in this place only to remark that such parts of it as have been admitted, relate to general maxims, and first principles, definitions of technical terms, the several kinds of things or estate, the formalities of contracts, and transfers of property, the nature of actions, the forms of declarations, the mode of pleading, and the mode of trial.

It was manifestly the object of the legislature of this country, at the commencement of the government, to introduce a general code of jurisprudence by statute. Hence we find many statutes in very early periods, producing a material variation from the English laws, and to this circumstance it is very probably owing that the laws in this state, are so much more different from the laws of the country from whence we emigrated, than they are in any other state in the union. In consequence of the adoption of this principle, we find that our ancestors, instead of considering the common law of England to be the basis of their jurisprudence, and in all cases binding, have only considered it as auxiliary to our statutes. In case of any defects in the statutes, recourse was had to the system of common law, to explain technical terms, to establish forms of proceeding, and to adopt such general principles, as could not be introduced by statute in the infancy of a country. The validity of it therefore in all cases depended upon its being approved of, and adopted by the courts, and the authority of the courts to admit it, originated

in the general consent of the people, as no statute was ever made on that subject. In such cases our courts exercised the same discretionary power and jurisdiction, as have been exercised by all the English judges, from the earliest periods of their government, to the present time. There are a vast many improvements which were introduced by the courts without any legislative act. The best part of the fame of the celebrated Lord Mansfield, is owing to his meritorious exertions, to extend the speedy remedy of the law as far as possible, to prevent the circuitous, expensive and lengthy applications in chancery. Our courts have always acted upon the same general principles, as the British courts. Conformably to this practice is the opinion of the superior court, in the case of *s* Wilford, &c. against Grant, which was approved by the supreme court of errors. "The common law of England we are to pay great deference to, as being a general system of improved reason, and a source, from whence our principles of jurisprudence have been mostly drawn. The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason, or unadapted to our local circumstances, the policy of our law, or simplicity of our practice." Under these restrictions and limitations, the common law of England may now be considered obligatory in this state. Whenever a question arises which has not been settled by statute; or by some principle of the common law, adopted by our courts, we are then to examine and compare the rules of the common law of England relative to the point, and if they are found reasonable and applicable, the court will adopt them, and if not, then they will decide the question on such principles, as result from the general policy of our code of jurisprudence, and which are conformable to reason and justice. That part of the English common law, which has been thus approved by the courts, may be considered as our common law by adoption; that part which has not been thus adopted, may in virtue of the general assent of the people, and the practice of our courts, be considered obligatory, so far as it is consistent with reason, adapted to our local circumstances, and conformable to the policy of our jurisprudence.

The English common law has never been considered to be more obligatory

obligatory here, than the Roman law has been in England. There in all cases where the reason of the Roman law was applicable, the courts have adopted it; and they have derived many important and useful rules and principles from it.

2. The practice and decisions of our own courts, have given birth to another branch of common law. We have introduced the English practice with respect to the authority of precedents. Courts are not at liberty to depart from prior decisions, in similar cases, unless they are repugnant to reason. It is therefore a common practice, when any dispute arises respecting a point of law, to refer to precedents. The uncertainty, and contradiction of oral reports of cases, induced the legislature to pass an act, requiring the judges of the supreme court of errors, and the superior court, in all disputes upon questions of law, to reduce the grounds and reasons of their opinions to writing, and lodge them with the clerk of the superior court, for the purpose of forming a perfect and permanent system of common law. This is a most excellent expedient to ascertain the points settled by the court, but reports of the cases are necessary to complete the plan. To accomplish this purpose, Mr. Kirby has published a valuable volume of reports of cases, adjudged in the superior court, from the year 1785, to 1788. This volume of reports is all that we have written upon our common law: we are therefore obliged to trust to the memory of man, for those adjudications, on which our rights depend. This will continue that uncertainty, and contradiction that has been the subject of so much complaint, till a reform takes place. Reports would be of the highest advantage, to improve and perfect our laws, to fix and perpetuate a permanent universal rule, that should render the decisions of different courts uniform and consistent.

The only courts whose decisions have the authority of precedents, are the supreme court of errors, and the superior court. The judgments of the latter may be revised on a writ of error brought to the supreme court of errors, where determinations are conclusive, and who are the dernier resort in settling the principles of law. But so long as the judgments of the superior court are unreversed, they are deemed to be law.

The consequence of admitting the doctrine that a judicial decision becomes a rule in all similar cases, has been very important. Our courts by legal adjudications, have given new force, and evidence to a principal part of the common law of England, and have established it to be the common law of this state. They have by a series of decisions ascertained the construction of the statutes, by which many very important points, and principles have been settled.

The consequence of the doctrine that the English common law is not in itself binding in this state, has been the introduction of many new rules, and principles, which have greatly improved our legal system. Our ancestors unfettered by the shackles of forms, customs, and precedents, have attended to enlarged, and liberal views of policy; and from the operation of our statutes, which so materially changed the common law, at the same time regarding the singular, and fortunate situation of our country, at its first settlement, with our difference in manners and character, from the nation from whence we migrated, have deduced a variety of legal principles, and have adapted them, to the state of this country, which constitute the main excellence of our jurisprudence.

When it was received as a general maxim, that the common law was binding only, when reasonable, and applicable, the necessary consequence was, that in all cases of a defect of common law, not supplied by statute, the courts must supply it by an adjudication, grounded upon the basis of all laws, reason and justice. This permitted them to reject many of the principles of the common law, which having been introduced into England in a barbarous, and ignorant period, when the rights, and privileges of man were inaccurately understood, had become inconvenient, and burdensome, but being interwoven in their code, could not be there rejected by their courts. It gave our courts at the same time, an opportunity to introduce all those important principles, which better information had discovered. In all instances then, where there has been a legal decision of our courts, repugnant to any of the rules of the common law, it may be considered as repealed, and the adjudication of our courts, is common law in this state. Our courts still possess, and exercise the same privilege, and whenever they find

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the common law unreasonable, impolitic, or unjust, or repugnant to the general tenor of our jurisprudence, they have rejected it, and adopted, such rules in their decisions, as they conceived to be right, and consonant to the general principles of our law. Such was the case of Wilford, vs. Grant. Judgment had been rendered against adults, on trial, and conviction, and against minors by default, without assigning them guardians. The question on a writ of error was whether judgment, could be affirmed against the adults, and reversed as to the minors. It was agreed that the rules of the common law, were against a reversal in part in such case; but the court said, that it had been admitted in other cases without any apparent diversity of reason, and as it did not appear to have been adopted in practice, so as to become authoritative, they would not regard it, but in pursuance of the general principles of reason, and law, they would reverse the judgment as to the minors only.

One part of the English common law consists in particular local customs, which affect only the inhabitants of particular districts. But in this state we have no local customs, but the citizens are all governed by the same general rule: unless we except the five city corporations, whose peculiar rights, and privileges are designated in the statutes by which they are incorporated.

II. The other branch of our laws consists of statutes which are enacted, by the general assembly, the supreme legislative power.

Statutes are either general or special, public or private. General, or public statutes, have universal authority. They are printed and distributed thro the state, and courts are bound officially to take notice of them, without being specially pleaded by the party who wishes to take benefit of them. Special or private statutes, relate to the concerns of particular persons, they are not published with the public statutes, and courts are not bound to regard them, unless they are specially pleaded by the party, who wishes to take benefit of their operation, and in whose favor they are made. Statutes are said to be declaratory of the common law, or remedial of some defects, operating by way of enlarging, or restraining.

Statutes affirm, alter, amend, or change the common law, as cases require, or introduce regulations wholly new. In this country it  
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has been the object of the legislature to promulgate an equal code of laws, correspondent to the liberal principles, which are prevalent among mankind. They avoided adopting the slavish principles interwoven in the legal code of the native country of their ancestors, in the times of ignorance and tyranny. Having no prejudice in favour of long-established errors, and the venerable absurdities of antiquity to combat, they had an uninterrupted career in establishing political liberty, and happiness. Such is the advantage of founding a government, and instituting laws in an enlightened period of the world.

In framing laws, it is the duty of the legislature to render them as clear, intelligible, and explicit as possible, so that there can be no doubt about the meaning and intent of them, but as this is extremely difficult, mankind being apt to differ about the meaning of them, certain rules have been adopted for their interpretation and construction. The fairest and most easy method of construction, is to consider and investigate the intent of the legislature by the signs with which it is expressed.

1. Words that are used in enacting laws, are to be taken and considered in their common, customary, and popular use, and no grammatical construction will be admitted to vary or controul the apparent meaning of the law.

2. Terms of art, or technical terms must be considered according to the import and meaning of them in that art, science, or trade from whence they are taken.

3. Where words are clearly repugnant to each other, in two laws, the last will supersede the first. Later laws abrogate prior contrary laws, is a maxim adopted by all nations in their civil institutions.

4. When words are dubious, equivocal, or intricate, it is proper to consider the preamble of the act, which will often explain the intent of it, or compare them to some other law made by the same legislator and relating to the same point.

5. We must always take into consideration, the subject matter about

about which the law is concerned, and affix to the words made use of, a meaning corresponding to the subject to which they are applied. For the same words when applied to different subjects, have different meanings. That meaning must be taken which is commonly intended, when employed upon that subject about which the law is conversant.

6. Where words have no signification, or a very absurd one, if taken according to their literal common acceptation, there it is necessary to deviate from the common sense of the words, and construe them in such a manner, as will deduce a rational and consistent meaning. Mankind often make use of figurative, and metaphorical expressions, which if literally taken, would be nonsense—but legislators should be cautious how they run into this error ; for it is not safe to leave courts to deduce their meaning from such uncertain premises.

7. A common and universal method of ascertaining the meaning of a law, when the words are dubious, is to consider the reason and spirit of the law, or the cause which induced the legislature to make it ; for it is a common maxim, that when the reason of a law ceases, the law itself ought to cease. This method at first view, seems to be rational and well grounded. There may be many instances where a literal construction will do injustice, and many where the case is within the meaning and design of the law, but not within the letter. Here it seems to be necessary to give courts a power of considering the meaning and spirit of the law, and of applying it accordingly. If the case be within the letter but not within the meaning, that they may so determine, or if without the letter, but within the meaning, spirit, equity, or mischief, that they may extend the law to it. But this mode of construing law, gives too great latitude to judges, and may be improved to oppressive purposes. It destroys that uniformity, certainty and precision, which are the essence of law. It throws the rights of mankind afloat, by placing them upon the arbitrary opinions and capricious whims of judges. The lawyer can never tell, how to advise his client, and the people cannot know the law. This rule therefore should be admitted with great caution, and practised upon with great prudence.

8. *w* Penal Statutes are always to be construed strictly, for the benefit of the subject. Nothing more is to be deduced from the words, than what they expressly warrant, and they are not to be extended by implication. Thus the statute which renders it a capital crime for a woman to conceal the death of a bastard child, either by drowning, or secret burying, or any other way, must be confined to the only methods of concealment expressed by the statute, and the words "any other way," are void for uncertainty.

9. Statutes not penal, and which merely concern property, are to be expounded liberally, so as to answer the design of the legislature. The expressions like those which are void, in the above-mentioned penal statute, would where the statute was not penal, be extended to remedy the inconvenience for which the statute was intended.

10. Every part of the statute must be so construed, that if possible the whole must be allowed to stand. Thus any seeming contradiction must be reconciled by the manifest design and intent of the legislature.

11. A saving inconsistent with the body of the statute is void.

12. Where the common law and statute differ, the latter supercedes and annuls the former.

13. Later statutes, abrogate and repeal prior contrary statutes. This must be understood where the statutes are expressly contrary, or negative words are used, otherwise, if both the statutes can be reconciled, they must stand, and have a concurrent operation.

14. If a statute repealing another, be afterwards repealed, the first statute is revived without any express words, by mere implication.

15. Statutes calculated to diminish or restrain the power of any subsequent assembly, are of no validity, for each assembly must possess equal authority—of course they cannot limit or controul each other.

16. Statutes it is said, which are repugnant to the principles of

*w* Black, 622.

of justice, and the dictates of common sense, are void : and so are all statutes subversive of the fundamental principles of the constitution, with which no legislature has any right to interfere. It is contended that it is necessary that there be some restrictions and limitations to govern and controul the legislative power : that there must rest in the people a right to guard the constitution, and in judges a power to restrain the operation of unjust and unreasonable laws. It is considered by some writers, that only the consequences arising collaterally from a statute, that are absurd or unreasonable, are void ; but that if the legislature expressly pass an act, that is unreasonable, no court has a right to reject it, because this would elevate the judicial above the executive power. It is said by others, that tho the legislature is sovereign and supreme in all matters within their jurisdiction, yet they are governed by the principles of the constitution, the rules of justice, and the dictates of reason ; that when they exceed these limits, their acts are of no validity. Judges are not bound to conform to them in their determinations, and the people are not bound to yield them obedience.

This idea, tho very popular and very prevalent, requires some consideration. It is true that it may be said, that if there be no bounds set to the power of the legislature, in construing the constitution, that they may encroach upon the rights of the people ; they may pass laws requiring things immoral and unjust, and they may destroy the constitution ; that therefore, in such cases, the judiciary, shall have the power to declare such laws to be unconstitutional and void. A case may be stated, that the legislature pass an act requiring the people to commit some crime, authorising a court to condemn a man for a crime without evidence, or establishing their seats during life. In such cases the law would be so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions.

In like manner it may be said, and with equal truth, that the judiciary granting them this power, may adjudge and declare certain laws which are clearly within the constitution, and which are necessary to preserve the public safety, to be unconstitutional and void. It will be agreed, that it is as probable that the judiciary

will declare laws to be unconstitutional which are not, as it is, that the legislature will exceed their constitutional authority. It is possible that the legislature and the judiciary, will make such encroachments on each other, on the constitution, and on the rights of the people, but it cannot be called probable. A little reflection will make it evident, that no question will ever arise in very clear cases: where the point is really doubtful a question may arise.— There may be some instances where good men may very honestly differ respecting the construction of the constitution, because from the imperfection of language, the expressions may be ambiguous. It is therefore only with respect to such questionable points, that we are to consider who ought to be vested with the power of ultimate decision, and not in those extreme cases which may easily be stated, but probably never will happen. A few considerations will determine where this power ought to be placed.

The legislature must be considered as the supreme branch of the government. Previously to their passing any act, they must consider and determine whether it be compatible with the constitution. Being the supreme power, and bound to judge with respect to the question, in the first instance their decision must be final and conclusive. It involves the most manifest absurdity, and is degrading to the legislature, to admit the idea, that the judiciary may rejudge the same question which they have decided; and if they are of a different opinion, reverse the law, and pronounce it to be a nullity. It is an elevation of the judiciary over the heads of the legislature; it vests them with supreme power, and enables them to repeal all the laws, and defeat all the measures of the government. Whenever a law is passed by the legislature, the first business of the courts will be to decide whether it be constitutional and valid. The lowest courts must permit the question to be seriously and deliberately agitated before them, respecting the validity of the law, and then they must solemnly decide, whether an act passed by the supreme legislature be constitutional and obligatory on the people. Indeed the necessary consequence is, that no law passed by the legislature, can be deemed binding, till it has received the sanction of the supreme judiciary, and has been declared to be constitutional. The lower

courts may decide differently, and the obligation to obey a law may be uncertain, till some individual brings the question before the supreme tribunal for ultimate decision. Where this tribunal is composed of one branch of the legislature, perhaps no danger could arise, because they must have previously in their legislative capacity, have decided the law to be constitutional : but where the judiciary are independent of the people and the legislature, and hold their offices by an appointment of the supreme executive, it is a total prostration of the government, to vest them with a power of deciding that legislative acts are null. The legislature will lose all regard and veneration in the eyes of the people, when the lowest tribunals of judicature are permitted to exercise the power of questioning the validity, and deciding on the constitutionality of its acts—A principle so dangerous to the rights of the people, and so derogatory to the dignity of the legislature, cannot be founded in truth and reason.

All these inconveniencies are avoided by placing the ultimate right of decision in the supreme power of the land. The legislature have the sole power of making laws. The judiciary, have the sole power of expounding them, but they have no power to repeal them. The legislature are not under the controul or superintendence of the judiciary—if they pass laws which are unconstitutional, they are responsible to the people—who may in the course of elections dismiss them from office, and appoint such persons as will repeal such unconstitutional acts. On this power of the people over the legislature, depends their security against all encroachments, and not on the vigilance of the judiciary department.

Such are the outlines of our code of laws : in addition to which we have a system of equitable rules, to moderate and soften the rigor, and supply the defects of the laws. No government can stand on a firm basis, unless the laws are uniform in their principles, and universal in their operation. But from these general rules, there may be some instances, where individuals may in particular cases, be unable to obtain compleat justice, and there will be some cases to which general rules will not extend. This points out the necessity of courts of equity, who have power to relieve against the indirect

indirect unjust operation of general laws, and to furnish relief in all cases, where the ordinary course of law does not extend.

To pursue our enquiries with facility and perspicuity, it is necessary to exhibit a general plan of the work.

Government is instituted to maintain the rights, and redress the wrongs of individuals. We shall therefore in the first place delineate the form of the government, consisting of the legislative, executive and judicative powers. In the second place we shall consider the rights of persons, which will be divided into absolute, and relative; absolute, belonging to them as individuals, and relative as connected with their fellow-creatures.

The principal of these rights respect property, we shall therefore in the third place, define the several kinds of things, and their mode of conveyance. Mankind, when secure in the enjoyment of these rights, are in a state of political happiness; but as their repeated violation calls on government, for a constant exertion to redress them, it is necessary to consider in the fourth place what acts amount to an infraction of them, so as to be denominated wrongs, and the modes of redress. As the conduct of individuals, not only affects each other, but concerns the peace, and good order of government, we shall in the fifth place consider those actions, which are denominated crimes, because they disturb the peace, interrupt the good order, and endanger the existence of the community. To this will be added the mode of prosecution, and the various kinds of punishments for each offence. From the general operation of universal laws, some individuals under certain circumstances, may suffer injustice, as an indirect, collateral consequence of them, and it cannot be expected that positive laws will reach every possible case, and redress every possible injury. We shall therefore in the sixth place, consider the powers of courts of equity, instituted, and calculated, to supply the defects, and remedy the inconveniences of general laws.

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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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## BOOK FIRST.

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### Of the Powers of Government.

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#### CHAPTER FIRST.

##### OF THE CONSTITUTION OF CONNECTICUT.

**T**HE constitution of this state, is a representative republic.— Some visionary theorists, have pretended that we have no constitution, because it has not been reduced to writing, and ratified by the people. It is therefore necessary, to trace the constitution of our government to its origin, for the purpose of shewing its existence, that it has been accepted and approved of by the people, and is well known and precisely bounded.

Antecedent to the settlement of America, the king of England made sundry grants of territory to individuals. Our ancestors purchased the lands in the limits of Connecticut, of the grantees of the crown, and the Indian natives. Embarking in the enterprise without the royal aid, or encouragement, no form of government was prescribed. Too remote from their native country to be governed by their laws, they were under a necessity of framing a constitution and laws for themselves. In this respect, they were in a state of nature, and had the right, as well as the power of pursuing those liberal ideas of civil liberty, which had impelled them to undertake such an hazardous enterprise. Within the limits of this state, two colonies, settled about the same period.— \* In the year 1635,



a number of persons from Massachusetts, invited by the fertility of the land adjoining Connecticut River, made a settlement on its banks, and erected the town of Hartford, and the neighbouring towns. *b* In the year 1637, a colony from England, made a settlement at New-Haven. Sundry towns on Connecticut River, and the settlement at New-Haven, were without the jurisdiction of Massachusetts, or any government. They were in a political point of view, in a state of nature, and had a right to establish such form of government as they pleased. Sensible of the advantages of society, and the necessity of government, they at each settlement, agreed upon and subscribed certain articles, by which they voluntarily entered into a state of society, formed the social compact, and erected two governments, Connecticut and New-Haven, which continued separate, till their union by the royal charter, in 1662. These colonial governments, derived their authority from the voluntary association and agreement of the people, and we have here the most singular, and the fairest example of the operation of that natural principle, which impels mankind to unite in society. Here the social compact was made and entered into, in the most explicit manner. Here is the origin of a government upon natural principles.

But it being a common opinion, that new discovered land belonged to the king, whose subjects had discovered them, and that he alone had the right and the power to establish legal governments, and grant the title to the lands, the colonies of Connecticut and New-Haven, made application to Charles the second, king of Great-Britain for a charter. The king granted them a liberal and extensive charter, dated, April 23d, 1662, that incorporated both colonies into one, by the name of Connecticut, that erected a form of government, upon the same plan they had before voluntarily adopted, and that granted them a title to the territory within the limits of the colony. The application of the people for this charter, and their voluntary acceptance of it, gave efficacy to the government it constituted, and not the royal signature. This is the only charter that ever was granted by an English monarch to the people of Connecticut, and is now by statute the basis of our constitution. It

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continued in force, till the declaration of Independence dissolved our connexion with Great-Britain, and raised us to the rank of a Sovereign State.

Had the charter of Charles II. been considered as the basis of the government of Connecticut, the declaration of independence which annulled it would have placed the people in a state of nature, with the privilege of erecting such a form of government as they thought eligible. Indeed no form of government could have been valid, unless approved, and adopted by the people in convention, or in some other way. It is also unquestionably true, that in consequence of the dissolution of the political connection with Great-Britain, the people of this state had a right, if they had thought proper, to have exerted it, to have met in convention, and established a different form of government. But at the declaration of independence, the subject was considered in a different light. The authority of the government was supposed to have originated from the assent of the people, and never to have been dependent on the royal charter. During the whole period of the existence of the colonial government, Connecticut was considered, as having only paid a nominal allegiance to the British crown, for the purpose of receiving protection, and defence, as a part of the British empire: but always exercised legislation respecting all the internal concerns of the community, to the exclusion of all authority, and controul from the king, and parliament, as much as an independent state. Acts of parliament were not deemed binding here, and the assent of the king, and parliament, was not necessary to give efficacy to our statutes. The necessary consequence was that the renunciation of allegiance to the British crown, and the withdrawing from the British empire, did not in any degree affect, or alter the constitution of the government. The constitution which originated from the people, and had been practised upon, continued in operation, after the declaration of independence, in the same manner as before, and was equally valid. The people were only discharged from a nominal allegiance to the British crown, which they had recognized for the purpose of protection, and defence. These being withdrawn by Great-Britain, and war made upon them, they had a right to enter into a confederacy with any other states for the purpose

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of mutual defence : but their internal government remained unaltered, and the same. The general assembly which convened next after the declaration of independence, proceeding on this principle passed all the laws that were necessary to carry into effect, the constitution of the government on the original basis. They ratified, and confirmed the declaration of independence, they passed an act recognizing the ancient form of government, they made such alterations, and introduced such amendments, as the change of circumstances required. If the principles before stated are true, then the conduct of the legislature was constitutional, and there was no necessity of calling a convention of the people, to agree on the form of the government.

But if it be admitted that the royal charter was the sole basis of the colonial government, then it must be acknowledged that the dissolution of our connection with Great-Britain, annulled the constitution, and reverted the people to a state of nature. The legislature under such circumstances had no power to act under the former constitution, and their acts were unconstitutional, having no binding authority on the people. But admitting this to have been true at the time, yet the subsequent conduct of the people, in assenting to, approving of, and acquiescing in the acts of the legislature, have established, and rendered them valid, and binding, and given them all the force, and authority of an express contract. For there is no particular mode pointed out, by which the assent of the people to any particular form of government, is to be obtained. It may be expressed by delegates chosen for that purpose, to meet in convention, or it may be implied by a tacit acquiescence, and approbation.

Thus when we trace our government to its origin, we find it to rest upon a constitution, which was the voluntary contract of the people, and which has been ratified, confirmed, and approved by all succeeding ages. Our transition from a state of political subjection to Great-Britain, to independence, and sovereignty, was almost imperceptible. Tho we were witnesses to a most singular revolution, yet we experienced no commotions among the people, and no convulsion in our domestic government. Our legislature

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was never interrupted in their business, and they proceeded with the same calmness, and under the same form of government, to exert their powers, to repel the encroachments, and oppression of Great-Britain, as they did in the ordinary affairs of legislation, when they acknowledged her supremacy.

The statute containing an abstract and declaration of the rights and privileges of the people, and securing the same, enacts, that the ancient form of civil government, contained in the charter of Charles the second, king of England, and adopted by the people of this state, shall be and remain the civil constitution, under the sole authority of the people, independent of any king or prince whatever. And this republic shall forever be and remain, a free, sovereign and independent state, by the name of the State of Connecticut. By this statute, the people are expressly considered to be the origin and fountain of power. All government is derived from them, and is to be directed only to the promotion of their welfare. No individual is elevated high in rank above the rest, by the splendor of titles and ensigns of royalty, in whose majesty is placed the power of government; but this power is vested in the majesty of the people.

The people possess all the power that can safely be vested in them in their collective capacity, and all that is necessary to guard and secure their rights. They elect the supreme, sovereign authority of the government. The frequent opportunities of displacing their rulers, by annual elections, give them a most effectual restraint upon their conduct, and fix the firmest barrier of their liberties.

The powers of government are lodged in three bodies—the legislative, the executive, and the judicative. The legislature is composed of two branches, the governor, the lieutenant-governor, and the twelve assistants, elected annually by the people, and called the council. The representatives from the several towns, chosen twice a year, and called the house of representatives. These two branches are called the general assembly or court; they convene twice a year; they hold their deliberations in different apartments, and no act is valid without the concurrence of both. They

are emphatically called the supreme power of government. They can enlarge, diminish and controul the jurisdiction and authority of the other powers ; they can make and repeal laws ; they appoint the civil and military officers, and can do all the acts of a sovereign independent state.

The executive power is lodged in the hands of the governor, who is distinguished as the supreme executive magistrate ; the governor and council, the treasurer, the comptroller and the secretary.

The judicative power, is vested in the governor, the lieutenant governor, and the council, who are denominated the supreme court of errors, and are the dernier resort in all matters of law ; and the superior court consisting of five judges appointed by the general assembly, and whose jurisdiction extends through the state.

These may be considered as the supreme powers of the government. Their authority is general, extending to every part of the republic, and relating to the whole collective body, as one great corporation. But as a state, comprehending so large an extent of territory, cannot be governed and regulated like a small republic, it has been found necessary to make sundry divisions and sub-divisions, for the purpose of facilitating and expediting the distribution of law and justice, to every individual, and through every part of the state. On this account the state has been divided into counties, probate districts, towns and societies. This has opened the door for the establishment of subordinate officers, whose power is confined to the several divisions for which they are appointed.

The subordinate officers in the executive department are the sheriff, who is appointed by the governor and council, whose duty it is to preserve the peace of the county. Justices of the peace, appointed by the general assembly in the several towns, to preserve the peace of the county, but their authority is chiefly of a judicial nature.

The subordinate judicative power, consists of several courts of inferior and local jurisdiction. The courts of common pleas in each county ; courts of probate in each district, and justices of the peace in every town, who have jurisdiction through the county.

Towns

Towns are considered in the nature of corporations, their powers resemble those of a pure unmixed democracy. The inhabitants have a right to assemble together, they possess a small share of legislative authority, they have a right to pass votes respecting the internal affairs of the town, under certain restrictions and limitations, they appoint proper officers to manage the concerns of the town. These corporations are an important branch of the executive, and are calculated to regulate those minute and subordinate concerns of the people, which cannot be reached in very large corporations.

Societies are instituted for religious, or ecclesiastical purposes, and are vested with the power of appointing proper officers, and supporting public worship.

These are the civil powers of the state, but as mankind are exposed to foreign invasions, and internal insurrections; and are sometimes obliged to defend their lives, and fortunes, by arms, a military power is instituted for that purpose. This power is subordinate to the civil, and consists of the citizens within certain ages and descriptions. The governor is captain general, or commander in chief, the lieutenant governor is lieutenant general, and there is a proper gradation of officers thro every subordinate rank. On the strength and bravery of this militia, the ultimate safety of the republic depends when the appeal is to arms.

Such are the outlines of our constitution, and form of government. The minuter branches, and subdivisions, will be fully considered, when we come to treat of these subjects in detail.

The ultimate object, and scope of the constitution, are the safety, and happiness of the people, by the security, and preservation, of political liberty. It has therefore been enacted by statute, that no man's life shall be taken away; no man's honor, or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered, or any ways punished; no man shall be deprived of his wife, or children; no man's goods or estate shall be taken away from him, nor any ways indamaged, under the color of law, or countenance of authority, unless clearly warranted by the laws of the land. This may be called the great charter of the people, and is

an ample declaration, and bill of rights. In the course of our enquiries we shall find that sufficient provision has been made for their security, and legal remedies devised to furnish redress when they are infringed.

A question of importance has been agitated respecting the power of a legislature, to alter the constitution of a state. But it is generally agreed, that where a constitution has been framed by the people at large, by convention appointed for that purpose, or by the tacit agreement of the people, that no legislature has the power to alter it, and that the right rests in the people alone. This is a prudent precaution against any attempts in the legislature, to extend their authority, and establish despotism. It however retards the progressive improvement of government, by rendering necessary a recurrence to the people, to introduce every amendment, which experience may prove to be expedient. A constitution therefore that is unalterable by the legislature, should contain nothing but the outlines of the government, and leave it to the legislature to fill up the minuter parts, which will always authorise them to vary it according to the progress of improvement.

The constitution of the state of Connecticut is unalterable by the legislature in every respect, that is necessary to its preservation, and at the same time permits the legislature to make alterations, wherever improvements can be introduced. It is unalterable in these respects, that it cannot be changed from a representative republic ; that the people cannot be deprived of the rights of an annual election of one branch of the legislature, and of a semi-annual election of the other : that the number of representatives cannot be lessened ; that the legislative power cannot be exercised, but in the two branches ; that two assemblies must be holden annually. While these principles are adhered to, there is not the remotest danger, that the government will verge to tyranny. But in the executive and judicative departments, and perhaps, in almost every other respect, not enumerated, the legislature have from time to time, the power of making such alterations, as wisdom may dictate and the happiness of the people require.

## CHAPTER SECOND.

## OF THE LEGISLATIVE POWER.

**T**HE legislative power is lodged in the General Assembly, which is composed of two branches, called the Governor and Council; and the House of Representatives. To treat of this subject with clearness, I shall distribute it under the following heads. First, to consider each branch distinctly, with their peculiar and separate rules, and customs. Secondly, the mode of election, with the qualifications of electors, and elected. Thirdly, the privileges of the members of assembly. Fourthly, the time, place, and manner of their meeting. Fifthly, their power and jurisdiction, with their rules and customs. Sixthly, their method of making statutes, and proceeding in private matters. Seventhly, their adjournment, and dissolution.

I. I am to consider each branch distinctly with their peculiar rules and customs—and

1. Of the Council, which consists of the governor, the lieutenant-governor, and twelve assistants. The governor is elected annually by the freemen. He does not constitute a distinct branch, having a negative upon the other two, as in some states; but he is a member of one branch; he is considered the highest official character in the state, he presides in the council, he has the power of voting in all matters, and where there is an equi-vote, he has a double vote, or casting voice. The lieutenant-governor, sits in the council with the right of voting, and in case of the death, or absence of the governor, he presides, with the right of a casting voice, in case of an equi-vote. The twelve councillors, or assistants, are annually elected by the freemen, they sit in the same apartment with the governor, and lieutenant-governor, and no act can pass but by the major vote. The governor and lieutenant-governor, or either of them, with six assistants, constitute a sufficient number to transact business. If the places of the governor and lieutenant-governor be vacant, or they be absent, the senior councillor presides, who with six assistants are authorized to proceed in business. They must take the oath to support the constitution of the United States, and the oaths prescribed by statute.

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2. The House of Representatives is composed of representatives, elected by the freemen of the several towns in the state. The freemen of each town have a right to elect one, or two representatives, to represent them in every general assembly, that is holden. They meet in a separate apartment from the council. Forty members must convene before they can proceed to business. They choose a speaker, who presides in the house, with the privilege of a casting voice when an equi-vote happens. They choose a clerk who is sworn, and whose duty is to make proper entries of all their doings, and transmit to the other house all bills, and petitions that ought to be transmitted. The members must take the oath to support the constitution, and the oath of representatives prescribed by statute. When the house is thus formed, they become vested with certain powers and prerogatives, independent of any superior. Their decisions and determinations are examinable in no other court. They may punish their members for misconduct, before the house, by passing a vote of censure; by a reprimand of the speaker, by commitment for contempt, or by expulsion. They may examine, hear, and determine any difference that shall arise about the election of any of their members, and may determine who is, and who is not elected. They may examine the qualifications of the members, and if any persons are returned, who are not freemen, or who have obtained their election by bribery and corruption, contrary to the statute law, they may expel them. They can never expel a member for any act done previously to his election, unless it be a crime that rendered him ineligible. If a man after his election commit a crime that disqualifies him to be elected, there is a propriety, that the house should have the power to expel him. They have no power to examine, or censure a person for conduct before his election, that did not disqualify him to be elected. The people have a right to be represented by any person not expressly excluded by law; and the house of representatives, cannot judge respecting the propriety of their choice, nor throw a stigma upon the character of the person elected. The whole power of expulsion is confined to three cases, misconduct in the house, or the commission of crimes that render the person ineligible, or bribery and corruption in obtaining the election. In their decisions they are bound to con-

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form to the laws in being. The house have certain standing rules and orders, which are read at the opening of every session of assembly, that are calculated to introduce regularity in proceeding, decorum in debate, and to support the dignity of the house.

## II. Of the mode of election, and the qualifications of electors and elected, and of

1. I shall consider the mode of election. This business is conducted in the meeting of the freemen, in the several towns in the state, annually in April and September. The constables of the town warn the meetings, and the votes are to be taken by an assistant or justice of the peace, if any are present, otherwise by the constables: but the practice is in some towns for the civil authority to take the votes, and in some towns the constables. In the meetings held in the several towns in the state, on the Monday next following the first Tuesday in April, the freemen make choice of the governor, and lieutenant-governor, in the following manner. Every freeman writes on a piece of paper, the name of the person for whom he votes, and the same presents to the presiding authority, who, on receiving the same, shall in the presence of the freemen seal them up, and thereon write the name of the town and votes for the governor, and in like manner for the lieutenant-governor. The presiding authority shall either by themselves, or the representatives of the town, convey them to Hartford, and at the election deliver them to those persons who are appointed by the general assembly a committee to receive, sort and count said votes. The general court of election is holden at Hartford on the second Thursday of May annually, and the persons who have a majority of votes, are declared to be elected governor, and lieutenant-governor; but in case there be not a majority of votes in favour of any person, then there is no election by the freemen, and they are to be chosen by the assembly.

2 The assistants are chosen in the following manner. At the freemen's meeting in the several towns in the state, holden annually on the third Monday of September, every freeman may give in his vote for twenty persons, their names being fairly

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f Statutes, p. 44. g Ibid p. 44, 45.

written on a piece of paper, whom he judges qualified to stand in nomination for election, the May ensuing, which he shall present to the civil authority, or constables present : who shall enter the names of the persons voted for, with the number of their votes, a copy of which they shall send sealed up, to the general assembly at New-Haven, holden on the second Thursday of October, by the representatives of the town. At which assembly the votes shall be compared, and the twenty persons who have the greatest number of votes, shall be the persons whose names shall be returned to the several towns, as standing in nomination for the next election ; out of which number the twelve assistants shall be chosen. At the freemen's meeting, holden in May as before mentioned, every freeman has a right to vote for twelve of the persons nominated to be assistants, in the following manner. The presiding authority are to begin with the person who stands first in nomination, and the freemen are to bring in their votes \* on a written piece of paper to them who shall seal them up, and write thereon the names of the persons voted for, Each freeman having a right to vote for twelve of said persons. These votes are to be transmitted to Hartford, in the same manner as votes for the governor ; and the twelve persons who shall have the greatest number of votes, shall be declared to be elected assistants for the ensuing year.

The representatives are chosen twice a year, at each of the freemen's meetings above mentioned. Each town has a constitutional right to send one or two, as they think proper, excepting some towns which have been incorporated since the revolution, that are restricted to one representative. The method is for every freeman to give his vote to the presiding authority, by presenting the name of the person he votes for, written on a piece of paper, and the person who has a majority of votes is declared to be elected.

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\* It is not necessary that the name of the person voted for, should be written on the paper, but that there should be some writing on the paper, for if it be blank, it will not be counted. This provision is said to have been made for this purpose : If any person in nomination should be in a freemen's meeting, and any freeman should not incline to vote for him, and at the same time was unwilling he should know it, he might give in a blank, and it could not then be known whether he voted for him, or not. This was intended to give the freemen a chance to vote according to their opinions, without being biased, or overawed by men in office.

§ The peace, prosperity, and security of a republican government depend on the fairness and freedom of elections. Where these are controuled by undue influence ; and bribery, and corruption prevail, the constitution is in danger of being subverted. On this principle, our laws have wisely guarded against them, by enacting—that no person shall offer to another, any written vote for any member of the legislature, unless first requested, upon penalty of forty shillings, and that no person shall offer or accept any reward directly or indirectly, for voting or not voting, for any member of the legislature, on penalty of five pounds, and on conviction of a second offence, to be punished by disfranchisement. And that such person as shall be elected by such illegal practices, shall be incapable of serving in such assembly, unless he can satisfy them that it was done without his privity, and that he had not directly or indirectly any concern therein.

But these laws are a feeble barrier against the influence of bribery and the arts of intrigue, in comparison with that which is derived from the opinion and the virtue of the people. In almost every country where the people have possessed the right of election, bribery and corruption have been introduced, and electioneering has prevailed. The candidates appear publicly, and solicit the votes of the electors. In England, months are spent in canvassing towns and counties, the basest arts of intrigue are practised, the country becomes a scene of riot and dissipation, and thousands are expended in procuring an election. In the neighbouring states it is not uncommon for persons to set themselves up for candidates, and call on their friends for their votes and influence.

The corruption and disorder usually attendant on popular elections, have not only disgraced the people, but have brought an odium on representative governments, and have given too much colour to an opinion, that the people are unworthy that inestimable privilege which they are so willing to abuse, and are so easily induced to betray. It is therefore essential to the security of a representative government, that we not only secure to the people the rights of election, but that we also inspire them with proper sentiments to exercise it for their own happiness and welfare.

In this state, no instance has ever been known where a person has appeared as a public candidate, and solicited the suffrages of the freemen, for a place in the legislature. Should any person have the effrontery or folly to make such an attempt, he may be assured of meeting with the general contempt, and indignation of the people, and of throwing an insuperable bar in the way of attaining the object of his pursuit.

These nice and delicate feelings of the people respecting elections, constitute the firmest bulwark of our excellent constitution. It is a sentiment that ought to be engraved on the hearts of every individual, that it is their indispensable duty to confer their suffrages on the most worthy and respectable characters in the community, and that the man who is guilty of the base arts of intriguing, and electioneering, is unworthy the confidence of the people, and unfit for an office in the government. Every candidate for public honors, ought to have this sentiment indelibly impressed on his heart, that the obtaining of an office by the base arts of intrigue and electioneering is a personal disgrace: and that there is no true glory, in an elevation to the most important station, in a government, unless the suffrages of the people can be considered as a voluntary tribute of respect to acknowledged merit, and praiseworthy conduct.

The freedom of our elections is strongly supported by their frequency, and the number of the representatives. No person will find his account in taking much pains for elections, which so frequently happen, when the large number of the legislature diminish the personal influence and importance of each individual, to a narrow compass. Great has been the rage for sometime past of lessening the representation, to save expense and expedite business. Experience will demonstrate that the present large house of representatives, dispatch public business with more celerity, than smaller bodies, and there is no doubt, but that a diminution of their number would soon lead the way to an augmentation of their trifling wages, so that no saving of expence would be obtained. While no inconvenience is experienced, why should the representation be lessened, which would deprive a number of persons of the opportunity

sity of obtaining that information, concerning public affairs, by attending the general assembly, which enlarges their own minds, and enables them to disseminate political knowledge among the people.

2. I am to consider the qualifications of the electors, *i* who must be freemen, and for that purpose must be inhabitants of some town, of twenty one years of age, possess a freehold estate to the value of forty shillings per year, or forty pounds personal estate in the list, in that year wherein they desire to be admitted, or possess such estate, and be excused from putting it into the list, and be of quiet and peaceable behaviour, and civil conversation. Such persons may apply to the selectmen of the town, where they belong and on procuring a certificate from the major part, that they are qualified, any assistant or justice of the peace, is empowered to administer the oath in open freemen's meeting, legally assembled, and their names are to be enrolled in the office of the town clerk. Every person while he continues a freeman, has a right to vote for every public officer, and continues a freeman, notwithstanding any reduction in point of property : but for scandalous behaviour and infamous offences, the superior court may disfranchise him, and on reformation, may restore him. The selectmen are liable to a penalty of three pounds six shillings, for making a false certificate, but if a person is admitted a freeman on such false certificate, he is not disfranchised by a conviction of the selectmen. A question has been started, respecting the justice of excluding a person from the rights of a freeman, on account of his poverty. It is said that no person ought to be admitted to vote for the rulers, unless his circumstances in life, raise him above the danger of being influenced by the power of bribery and the arts of intrigue. Perhaps, property is not the most effectual safeguard against corruption, and that fairness of character, would afford a juster rule of discrimination, than the quantum of property. But in this state, of so little value is the estate requisite to qualify a person to be a freeman, that no inconvenience has been experienced by it.

3. Of the qualifications of persons to be elected members of the legislature. *A* Every freeman is eligible of common right, except-  
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*i* Statutes, 88.

*A* Ibid.

ing those, who hold certain offices which are deemed incompatible with seats in the legislature, and have been expressly excluded by statute. / These are judges of the superior court, \* and those officers under Congress, who are excluded from seats in the legislature of the United States. No statute has pointed out a crime which disqualifies a freeman to be elected into either branch of the legislature. No statute authorises the expulsion of a representative who is a freeman, if he be not unduly elected. The statute says, that no person shall be accepted as a representative, unless he be a freeman. As the statute law stands, every freeman, however infamous, is eligible into the legislature. \* If we have recourse to the common law, we shall find that no crimes render a person ineligible, but high treason, and felony. A house of representatives, being only one branch of the legislature, can have no constitutional right to expel a member for any act done previously to his election, unless he is disqualified by the common law, or by statute.

III. The privileges of the members of assembly, next require our consideration, and it is declared by statute, \* that no member shall during the session of the general court, or in going to, or from said court, be arrested, sued or imprisoned, or in any ways molested or troubled, or compelled to answer to any bill, plaint, declaration, or otherwise, before any court, judge or justice, cases of high treason and felony excepted. All such suits would abate, and the imprisonment would subject the prosecutor to an action of false imprisonment, and if the member should be committed to goal, he might on information be discharged, by order of the house in the legislature to which he belonged.

Every member is entitled to the privilege of freedom of speech in all debates, and cannot be called to account for it in any other court. Instances have happened, where actions of defamation have been brought for words spoken in the house of representatives, and the court refused to sustain them.

IV. Of the time, place and manner of their meeting—The stated times of meeting, are at Hartford, on the second Thursday of May, and at New-Haven on the second Thursday of October, annually. The house of representatives meet at their chamber in the  
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/ Statutes, 374. \* Ibid. 409. \* 1 Black. Com. 17. 1 Bac. Abr. 576.  
4 Inst. 48. \* Statutes. 28.

state-house in Hartford at eight o'clock in the morning of the day of election, and proceed to the choice of a clerk, then a speaker. The certificates of the election of the members are then produced and read, and their names enrolled. The clerk then administers the necessary oaths, and the house is formed. A message is then sent by some of their members, to wait on his excellency the governor, and inform him that the house is formed. The governor and council, who hold their offices till the election is completed, meet in the council chamber. The house of representatives being formed, at the direction of the governor, both houses proceed in procession to the meeting-house, where a sermon is delivered by some gentleman of the clergy appointed by the governor: a commendable practice, instituted by our pious ancestors, at the time when they founded the government, and which their pious descendants have continued to the present time.

When public service is ended, both houses return in like procession to their apartments, and appoint committees jointly to receive, sort, and count the votes of the freemen, and declare the persons duly elected. The committees of both houses, meet and proceed to count the votes of the freemen, and declare who are chosen governor, lieutenant-governor, and assistants,—and the persons elected, being sworn the council is formed, and the general assembly becomes organized.

The representatives on the second Thursday of October, at nine o'clock in the morning, meet at the state-house in New-Haven, and proceed to form the house as at Hartford. The governor and council, having convened at the same time, the general assembly is again organized.

Thus by the constitution, there are two meetings of the legislature each year, to consult and promote the welfare of the people. Besides the stated annual meetings the constitution has provided a method of convoking the general assembly at other times, if occasion requires. The governor, or in his absence the lieutenant-governor, or the secretary, upon any emergent, or special occasion, may call a general court upon fourteen days warning, or less if they think it needful, and they shall give an account thereof to the assembly when convened.



V. Of the power and jurisdiction of the general assembly—and

1. Of their power in the public affairs. *p* The general assembly possess the supreme authority of the state ; they have the power to make laws, and repeal them ; to dispose of lands undisposed of, to towns or particular persons ; to institute, and stile judicatories and officers, as they think proper ; and to grant all public taxes, and lay duties for a revenue. They may call any court or magistrate, or any other officer or person whatever, to account for any misdeemeanor, or mal-administration, and for just cause may fine, displace, or otherwise punish them, as the nature of the case requires. If no governor or lieutenant-governor be elected by a majority of the votes of the freemen, the general assembly have the power to elect them ; and if after the election, by death or otherwise, the office of any of the assistants become vacant, the general assembly may supply it by election. They may grant pardons, suspensions, and goal delivery, upon reprieve, in capital and criminal cases, to any person that has been sentenced in any other court. They have the power of appointing the judges of the superior court, of the courts of common pleas, of probate, and the justices of the peace. They have the power of regulating the militia, under the authority of congress, and the appointment of the generals, the colonels and the majors, and the choice of commissioned officers in military companies must be by them approbated before they are valid.

Such are the powers of the assembly that are enumerated by statute ; but by the nature of the constitution, they possess the power of doing, and directing, whatever they shall think to be for the good of the community. They may encourage literature, manufactures, commerce and agriculture, by bounties, or exclusive privileges. They have the power of erecting, and constituting corporations for these purposes. They may alter, or create counties, towns and societies.

In this body resides the supreme and sovereign authority, which is essential to the existence of civil government. It is difficult to define or limit its extent. It can be bounded only by the wants, the necessities, and the welfare of society. This power be-

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ing placed in a body, chosen by the people, and the individuals frequently reverting to a state of citizenship, there is no danger of their exerting it, to ruinous and oppressive purposes, because they must suffer the ill consequences of their own tyranny. But the sovereignty be considered as a quality of the supreme legislature, yet there are certain general rules, and fundamental principles, by which they are to be restricted, and directed in their proceeding. The constitution must be held sacred and inviolable, and can never in any measure be varied or amended without the consent of the people at large, by whom it was originally made, and from whose approbation and consent it derives its authority. In enacting laws they are bound to consult the highest political happiness of the people; they may never restrain the natural liberty of any person, unless it be found necessary for that purpose, and they may never oppose the immutable principles of morality. Under these restrictions, they have the supreme sovereign power, of making such laws as they judge proper, and the people are under the strongest obligation to yield the most explicit obedience.

a. Of the jurisdiction of the assembly, in matters of a private nature. They have the power of authorising, and validating the doing of a variety of acts not binding in law, as the sale of estates by minors and married women, where it will be for their interest.

They pass special acts of bankruptcy in favour of those persons who have been reduced and rendered unable to pay their debts by unforeseen accidents, and unexpected misfortunes. It is impossible to point out the rules by which they are governed in such cases, for having sovereign power, and being a changeable body, they are directed only by their discretion, upon the circumstances of every particular application. It may generally be remarked, that the petitioner must shew that his losses have been sustained by unavoidable misfortunes, and not by his own imprudence and misconduct; that he has acted honestly and uprightly in his business, that he makes a full disclosure of his property, that by the granting him an act of insolvency, his property may be justly distributed among his creditors, and he be restored to the rights of a citizen, and enabled to prosecute some honorable business for his support; that

denying him such a favour, will defeat an equal distribution of his estate, and involve him in a calamity, from which his creditors can derive no benefit, and prevent him forever from being useful to himself, or the community. But whenever congress shall pass general laws of bankruptcy, pursuant to the power vested in them by the constitution, this power will cease.

The general assembly exercises the power of granting bills of divorce, in cases beyond the jurisdiction of the superior court, in which they judge it reasonable. No precise rule can here be pointed out, but it is a matter of discretion. From the instances which have taken place, it may be inferred, that presumptive proof of adultery, and direct proof of cruelty, abuse and enmity, which render the situation of the suffering party dangerous, or miserable, and defeat the design of the matrimonial connexion, will induce the legislature to grant a divorce, and make such disposition of the estate of the husband, where he is the offending party, as is reasonable for the support of the wife.

The general assembly have reserved to themselves original jurisdiction, in all suits for relief in equity, where the value of the matter, or thing in demand, exceeds the sum of sixteen hundred pounds. At first the assembly reserved all the power of a court of equity in their hands; but experience teaching the inconvenience of the practice, induced them to delegate all their power in all matters under sixteen hundred pounds, to the superior and county courts. Why the whole power was not delegated, and why the superior court is not as able to decide all controversies in equity, exceeding sixteen hundred pounds, as they are in law, no reason can be given.

A question of great nicety and difficulty arises respecting the constitutional jurisdiction of the general assembly, in controversies of a private and adversary nature. It ought to be deemed an inviolable maxim, that when proper courts of law are instituted, the legislature are divested of all judicial authority. It is true, that in England in early times, the parliament assumed jurisdiction in private controversies, and a similar practice has been adopted by the assembly in this state. It has sometimes been contended

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that the assembly by virtue of their supreme authority, may superintend and overlook all inferior jurisdictions, and may proceed upon the principles of abstract right and perfect justice, to grant relief to the people in all instances in which they have sustained wrong in any possible manner whatever. This would be a power of a most excellent nature, to be lodged somewhere, if we could find a perfect person to exercise it. But it is apparent, that the admission of this would destroy all ideas of a uniform, permanent system of law, erect one great arbitration over the state, and throw every thing afloat on the wide ocean of whim and caprice.

It is enacted by statute, that no petition shall be preferred to the assembly, but in cases where no other court is by law competent to grant relief. The true meaning and construction of this statute, is not that petitions may be preferred to the assembly in cases where the courts refuse relief, because that by the rules of the law relief ought not to be granted; but that where a new case happens, that has never been contemplated by a court of law, or equity, so as to adopt a rule respecting denying, or granting relief, then such omitted case, may be the ground of an application to the legislature. For it can never be said, that a court is incompetent to grant relief in a certain case, when by the rules that are adopted by the court, relief ought not to be granted. A contrary construction will be productive of mischievous consequences. If an equitable claim, that has been disallowed by a court of law or equity, or if an apparently equitable claim, that must be dismissed by court of equity as well as of law, be a proper foundation for an application to the general assembly, their jurisdiction must be extensive, and they may review the determinations of all the courts they have constituted. How many instances can be found, where challenges in law and equity have been erroneously, as well as legally rejected, upon which a petition can be preferred to the assembly, with a statement of facts which might induce a tribunal, that acted upon discretionary principles of doing justice, to believe that relief ought to be granted. If they can interfere in one instance, they can in all, and the consequence will be, that every controversy must ultimately be decided by the legislature. It therefore is the

only maxim, that can be adopted consistent with the genuine principles of the constitution, that no legislature has a right to interfere in any private controversies, between man and man, which are cognizable by the courts, tho such courts have rejected a claim, apparently just, because by the rules that they had adopted, or the laws in being, no relief ought to be granted. For such interference not only destroys the certainty, and uniformity of laws, but is of itself, an *ex post facto* law, which no legislature can constitutionally pass. Let the legislature make good laws, and leave it to the courts to expound them.

It must however be acknowledged, that the legislature have paid no regard to these principles, tho fairly deducible from their own law. I have known repeated instances where they have sustained applications that manifestly and expressly were excluded from relief by the general laws. I have known petitions preferred to obtain relief in cases against the decision of courts and juries, and the assembly have gone over the head of such decisions and granted relief.

I have known them grant relief, when the claim was barred by the statute of limitation; tho it is one of the clearest principles in a court of equity, that no relief can be had against the operation of such a statute: for all statutes of limitation, suppose that there is a possibility, that just claims may be barred, but the necessity, of preventing disputes of a long standing will justify the measure.

When we consider the legislature as a legal tribunal, exercising this extraordinary branch of jurisdiction, it exhibits our jurisprudence in a singular light. We have courts of law and equity, instituted for the purpose of deciding all questions of right, between man and man, by positive rule, as well as by equitable principles. But if a man should fail to obtain redress in the ordinary courts of judicature, he may then apply to the extraordinary judicature, the general assembly, who are not governed by the principles of law, and equity, but render justice according to their sovereign will, and pleasure. It is true, that at the first settlement of the country, the general assembly was considered as a judicial tribunal, and appeals were admitted in all cases, from justices of the peace, to county courts

courts, then to superior courts, and then to the general assembly. This must have been owing to the inaccurate ideas of our ancestors, with respect to the proper power to be lodged in the different branches of the government. Hence we find that as their knowledge increased by experience, they were constantly lessening their judicial jurisdiction, till finally they disburdened themselves of the whole, excepting in cases of equity, where the sum in dispute exceeded sixteen hundred pounds. As soon as the legislature have established proper tribunals, for the decisions of all controversies, according to law and equity, they can have no right to interfere in the decision of such controversies: for the human mind cannot imagine a greater absurdity than to establish courts of law and equity to determine all questions of right between man and man, and then to admit the legislature to exercise a sovereign authority, in relieving against their determinations. The constitutional power of the legislature is to make laws, of a court of judicature to expound them; but where shall we stop if the legislature, in private disputes, may make a law, which shall relieve against the operation of a prior law of their own making, as in the cases of statutes of limitation. We shall have one grade of tribunals to act by established, uniform, and general rules, and another to reverse their decrees without regard to rules.

If the legislature were to pursue the principles which result from their determinations, they might grant relief against all decisions at law, and in equity, and might set aside all statutes of limitations; but they never consider themselves to be bound by prior decisions. They furnish a remedy in one case, and deny it another, standing on a similar basis—Of course they never have any general rules to govern their proceedings. Let a case be ever so equitable, no man has any grounds on which he can calculate with certainty respecting relief. If the right of the case be doubtful, yet so uncertain is the rule of decision, that there is a possibility of success. Indeed from the nature of the tribunal, it is utterly impracticable to systematize the principles of proceeding: they are therefore obliged to adopt that abominable doctrine, that every case is to stand on its own bottom, and be determined according to its particular circumstances; and they can take no other guide than sovereign whim  
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and supreme discretion. The consequence of this has been the accumulation of business of a private and adversary nature, which is extremely burdensome to the legislature, and inconvenient to the parties. A considerable portion of the time of each session, is taken up in hearing private disputes.

Not only do the legislature disregard prior decisions, but where an application has been rejected at one session, it is no bar to another application for the same thing : and by repeated applications, the suitors sometimes by changes of the members of the legislature, a very changeable tribunal, will gain their causes. This is an effect, offering a premium to litigation.

No tribunal can be less adapted to the decision of private disputes, than the legislature. The house of representatives consists of nearly one hundred and eighty members. It is impossible for them in the ordinary course of hearing, to investigate the truth of a long intricate story, or to comprehend all the principles on which a decision ought to be founded. In such a numerous body we can not expect that coolness and candour in their deliberations, which ought to mark the conduct of a judicial tribunal. Generally, I do not think, that one member in ten, is master of the cases decided by the legislature. It is a serious reflection, that the rights of property should be dependant on the vote of such a tribunal. I am confident that it very rarely happens, when they interpose, that they accomplish that justice, which they aim to pursue. It is strange they can wish to exercise a power so manifestly unconstitutional, and so highly inconvenient. I know of no other legislature which assumes such an extraordinary jurisdiction ; and I hope for the honor of the state, this only reproach to our system of jurisprudence, will very soon be wiped away.

It is enacted by statute, that no petition shall be preferred, unless the value of the debt, damage, or matter in dispute, exceed seven pounds. In this place, two general rules that respect the members of the legislature, may be inserted. That no member shall disclose any matter enjoined to be kept secret, or make known to any person, what any one member of the court speaks, concern-

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ing any person or business, that may come in agitation in the court, under a penalty of ten pounds : " and that no member shall appear as an attorney, unless in his own case, or the town he represents, or in such case, wherein the law will not allow him to sit as judge, and if any member appear at the bar, in the character of an attorney, his seat is vacated for the time for which he was elected.

VI. Of the method of making statutes, and proceeding in private matters. And, 1. Of making statutes, and proceeding in public matters.

The session of assembly is opened by an address from the governor to both houses, in which he suggests to their consideration, the proper business to be done, and lays before them all public papers, letters, and communications.

A bill may originate in either house. In the house of representatives, no member may bring in a bill, without first obtaining leave of the house. This must be done by motion for leave, when the member states the substance of the proposed bill. The granting leave sometimes is objected to, and a debate ensues ; but the usual method is to grant leave on motion, without objection or debate.—The house sometimes appoint committees to prepare and bring in bills on particular subjects, and sometimes to take into consideration any special matters, and report by bill or otherwise. In some cases, committees are appointed by both houses to join in consideration of any matter, and make report. When the bill is brought in, it is read once and laid on the table, and cannot be read again on the same day, and proposed by the speaker for debate, without order of the house. On a second reading of the bill, the speaker proposes it for debate. If it be lengthy, and contains sundry paragraphs, it is usual to consider it by paragraphs. Any member may propose any amendment or addition. When the members have finished the debate, and the question is called for, the bill being read a third time, the speaker puts it to vote. If the bill pass, an entry is made by the clerk, and the bill without ceremony, or parade, is by the clerk transmitted by the hand of the officer who waits on the house, to the secretary, who by the sheriff transmits it



to the governor. When a bill passes the council, the secretary makes an entry and sends it by the officer, to the speaker of the house of representatives. When a bill passes one house, and is transmitted to the other, it may be taken into consideration. In the house of representatives, they proceed, as tho the bill was brought in on motion. If the bill pass without alteration, it is transmitted to the secretary, and becomes a public act, irrevocable without the consent of both houses; but if either house pass it with alterations, or negative it, then it must be transmitted to the enacting house, who may appoint a committee of conference: the bill is returned to the other house, who appoint a committee. When the committee have conferred, a report is made by the committee, of the reasons given by the enacting house, to the negating house, when the question of reconsideration and concurrence is tried: if it passes in the affirmative the bill becomes a public act, if in the negative it is dead, and can be revived only on motion for reconsideration. If a bill pass, and during the session, either house wish any amendment, it must be proposed by message to the other, as the joint concurrence of both is necessary to the alteration: the proposed amendment must be stated—if both houses agree, it will be valid, but if either dissent then the original act stands. When an act is passed, the secretary records it, and it is in force from the rising of the assembly.

In the October session of assembly, the house of representatives appoint committees to receive the military returns, and make report, to receive the lists from the several towns and make up the grand list, to receive the votes of the freemen and count them, jointly with a committee from the council, and report the persons nominated for election in the ensuing May. In the May session, committees are appointed to receive military returns, and the additions to the lists, and report. The members for the several counties, nominate the judges of the county courts, justices of the quorum, and justices of the peace, for each county, and the judges of probate in the districts in the several counties, and lay in bills for their appointment. The members that live in the limits of brigades nominate general and field officers—and lay in bills. But the concurrence of both houses is necessary to the appointments.

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These are the outlines of the general mode of proceeding founded on custom, or express rules which have been adopted—but with respect to which no statutes have been made. These rules contain sundry other minute directions, which I need not here enumerate: but I cannot fail to remark upon the conciseness and simplicity of the mode of transacting business in the legislature. There is no public formality in communicating the acts of one house to the other. The acts attested by the secretary or clerk, and transmitted by an officer, is all that is required. The house of representatives, never resolve themselves into a committee of the whole house, to consider any subject. All bills, however important, are subjected only to one discussion, unless they are postponed, and a single vote decides their fate. This mode is extremely well calculated for expedition, but it must be acknowledged, that it sometimes precludes that fair chance for deliberation, enquiry, and discussion, which is had in other legislatures.

2. Of the method of proceeding in private matters. The mode of bringing private controversies before the assembly, is by preferring a petition or memorial, stating the nature of the dispute, and signed by the party; to which must be annexed a citation to the opposite party to appear, signed by proper authority, a duty of twelve shillings paid, which must be legally served on the opposite party, by leaving a copy with him, at least twelve days before the first Tuesday after the commencement of the session of assembly; on which Tuesday, the party must be notified to appear. The petitioner must appear the next Wednesday after the commencement of the session, or his petition will abate. All memorials, where no person need be cited, must be lodged in the secretary's office, on or before the eighth day of the session, or they shall not be heard. But the legislature may dispense with this rule, and admit on motion.

The mode of trial of adversary matters is as follows.—The respondent may plead in abatement to the petition, on account of any defect in the manner of bringing it forward, or that the matters contained in it, do not warrant the interposition of the legislature, in the nature of a general demurrer. If there be no plea in abatement, it is usual to go to trial on the merits without

pleading: The governor calls both houses together; when the proceedings are public. Witnesses are introduced, and examined, and the counsel argue the causes. When the public hearing is finished the houses separate and take the cases into consideration and debate the matter if they please. If either house refuse to abate a petition, on a plea in abatement, it goes of course to a hearing. Both houses must concur in any grant, and in case of differing votes, they confer by committees as in public bills. If a grant be made, a bill in form is drawn pursuant to the grant, and passed into a resolve, which is in the nature of a decree. \* If on trial, it appear that either party has given the other unjust trouble, the party wronged, shall recover his just cost, and damages.

If a petition be called, and the party cited does not appear, it may be heard before the houses separately. In such cases, and in petitions where there is no opposite party, the method of proceeding in the house of representatives is, to hand the petition to the speaker, and when it is read, some member having been previously thereto requested, informs the house that the petitioner wishes to be admitted on the floor, to be heard in support of his petition, which is granted of course. The petitioner may then come forward with counsel if he pleases—and may enforce his petition by proof and arguments, as he thinks proper. When the hearing is finished, the house proceeds to a consideration and determination. In like manner, the petitioner may be heard before the council, and if the houses differ in their votes, committees of conference are appointed, as in case of public bills, and if both houses concur in a grant, a bill in form passes into a resolve, and establishes the grant. Sometimes when the facts are many and intricate, they appoint a committee of the members to hear, examine and report the facts, with their opinion thereon, and sometimes of persons who are not members.

VII. This subject will be closed by considering the adjournment and dissolution of the assembly. Either house, may adjourn from day to day, and both houses may adjourn to any proper time, within the limits of their appointment.— y but no general court can be dissolved or prorogued without the consent of the major part.

\* Statutes, 191.

y Statutes, 178.

part. The members are considered, as holding their offices till new appointments are made. An actual dissolution of the council happens annually ; of the house of representatives, semi-annually, which is the only mode, by which a dissolution can be effected.— When they have finished the business before them, both houses convene, and the governor after an address to them, dismisses them from any further attendance, which is called the rising of the assembly.

A stranger in looking over our constitution, and observing the frequency of the election of both branches of the legislature, the vesting in it the appointment of all officers, usually appointed by the executive, the giving so little power to the governor, would think that it must render the government extremely feeble and inefficient. But when he came to observe it in practice, he would find it to be well calculated and balanced to answer the purposes of its institution.

A sentiment has for a long time been impressed on the minds of the people, that it is best for the community, to continue in office all persons who have once been honoured by their suffrages, in case they continue to merit their confidence. In consequence of this, there are but few instances where persons have been left out of any of the higher offices, till age and infirmity rendered it necessary. This noble sentiment seems to be interwoven in the character of the people, and has a powerful tendency to render public offices secure and permanent. In the election of the council, the mode established, is wisely calculated to prevent any change, by the influence of any sudden whim or caprice : while the people have full power every year to dismiss a person whose misconduct had alienated their regard and confidence. The privilege of the freeman, to give their suffrages for twenty persons to stand in nomination for election, and the law that the twenty who have the highest number of votes, shall stand in nomination, gives a decided advantage to those, who are actually in office, because they must be best known, and will be most generally voted for. The practice of placing those who are assistants, the first on the list, according to seniority of office, tho others may have a greater number of votes,

is a great security of their re-election ; because the law requires that those who stand first in the nomination, should be first voted for. In such cases we find that there is a wonderful mechanism in voting. The freemen in general will not have any personal attachment to the persons nominated, and they will generally vote for those who are first called. There may be some places where local feelings may operate, but this will rarely be sufficient to counteract the general indifference. Numbers towards the close of voting will usually retire. These circumstances will forever co-operate, to give sufficient security and permanency, to the seats of the assistants, and to counteract the intrigues of party, and the fluctuation of popular instability. But at the same time, the assistants can never obtain such certainty of continuing in office, as to tempt them to extend their power, and encroach on the rights of the people. They must consult the public good, to secure the suffrages of the freemen, for whenever they become generally unpopular, they will infallibly be dismissed from office. This advantage then resulting from the mode of election, has no effect but to render permanent the seats of those who conduct well, by guarding them against the schemes of parties ; but when the conduct of an assistant requires his dismissal from office, the people have ample power to accomplish it. This mode of election, therefore, may with propriety be considered, only as a check upon popular instability, and not any infringement upon freedom and fairness in election.

The mode of placing the names of the persons in nomination cannot be called unfair or injurious as relative to the candidates. The person who has the highest number of votes, has no greater right to be elected an assistant or to have his name so placed as to give him a better chance to be elected than he who has the smallest number. If none have a preferable claim, and if there will be a certain mechanism in voting, let whatever mode be adopted, it is clearly good policy to direct its operation in favour of permanency and stability in government, especially when it is so popular as in Connecticut.

The election of the house of representatives twice each year, produces no inconvenience. The smallness of the districts from  
which

which the people assemble, prevent its being burdensome, the frequency of election prevents intrigues, and the disposition to re-elect men of merit, prevents any general change of the members.

But the vesting in the people, and in the legislature, the appointment of the executive and judiciary, seems at first view, to be leaving so little power for the governor, who is called the chief magistrate, that the executive arm cannot be sufficiently strong to carry the laws into effect. If this state constituted a distinct government, unconnected with the United States, it is beyond a doubt, that the power of the executive must be increased to give stability, and energy to the government. But while it constitutes a part of the union, and directs only the internal concerns of the state, the power of the supreme executive, will be found adequate to every purpose, while the limited extent of it produces the best effects.

The governor has the power of making so few appointments, that he cannot by force of his office, establish and arrange such a connexion of friends, and train of dependents, as to secure his re-election by his official influence. He must depend upon his capacity and patriotism, to retain his seat. He will not be able to command it. But in some states, so great is the patronage of the governor, that by his appointments to office, he may form so powerful a combination in his favour, as to secure his election, and give him an influence prejudicial to the freedom and independence of the people. A governor ought not to have the means of accumulating such power in his own hands. It will be a constant temptation to keep such an object in view in all his appointments, and the public good will invariably be sacrificed to his ambition. He will appoint those only, who combine their exertions, to promote his interest, and if there be a number of well-meaning, honest men, who wish to get rid of such oppression, or who conceive him to be unfit for the office, he will be sure to keep them out of office, to prevent them from counteracting his schemes. The appointment by the legislature as in this state, precludes all these inconveniences, and tho it may be considered that an annual appointment, must render such offices too insecure, yet the general principle having been adopted, that when persons are once appointed to an office, they

they are entitled to be re-appointed, unless they have become disqualified by infirmity or misconduct, they may consider themselves as appointed during good behaviour : but the appointment being annual a person may at any time be left out, when he becomes infirm ; or may be dismissed for misconduct, without the formality, and expence of an impeachment.

But there is another consideration which evidences an important advantage in our constitution : as the general government regulates all national concerns, and conducts the intercourse with foreign nations, there is no necessity of a very strong executive in the states. If the state executive be vested with great patronage and influence by force of appointments, the consequence is, that as the head of the state government, the governor draws to himself, so much importance, that he will view the government of the union, with a jealous eye. He may be apprehensive, that the splendor of his office, may be clouded and the strength of his arm lessened by it. This will be a perpetual temptation to him to counteract the measures of the general government, in support of his personal dignity, and the extensive influence, he may acquire by his power of appointments, may enable him to make a very serious and formidable opposition. But the executive of this state is admirably well calculated for a government, that is subordinate in certain respects to a general government. Here is no person distinguished by such power and influence, that he will be jealous of the union ; but the first magistrate, and every member of the state government, will consider their importance, and respectability, augmented by their connexion with the general government. They can have no personal motives to attempt to embarrass the measures of it ; but if the governor should be actuated by such a jealousy, his power will be insufficient to defeat its measures. In all the states it must be important, to have such a general distribution of power, as will be best calculated to carry into execution the laws of the state, as well as of the union, without admitting a combination of power to counteract them. But in the general government, the supreme executive must be vested with powers co-extensive with his duty. The preservation of the peace of the union, and the protection against foreign invasion. Here we may with propriety require strength in the executive.

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The foregoing theory, perhaps, may be considered as confirmed by the fact, that in no state in the union, has the administration of the general government met with more decided approbation and firm support, than in Connecticut.

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CHAPTER THIRD.

OF THE EXECUTIVE POWER.

**T**HE executive is divided among several officers, which will be considered under two heads, the supreme, and the subordinate.

**L** The supreme executive power is confined to narrow limits by the nature of our constitution, and our union with the United States.

Tho the power of the governor is less in this state, than in some others, as he does not constitute a distinct branch of the legislature and can make but few appointments to offices, yet it still deserves to be considered as a station of great respectability and dignity. In his legislative character, he is the president of the council. In the executive department, he is the supreme executive. *a* He is the chief magistrate of the state, with the stile of his excellency. *a* He is commander in chief of the militia, with the power of appointing the adjutant general, two aids du camp, and of dismissing commissioned officers. He signs the commissions of all judges, justices of the peace, and military officers. *b* He has the power of justice of the peace throughout the state. He is the channel of correspondence with neighbouring states, and with the government of the United States. All communications of public papers, and acts of congress are transmitted to him, from the heads of the executive departments, and all orders from the supreme executive of the union, are directed to him. He has the power of issuing proclamations upon all proper occasions. *c* He may reprieve a condemned malefactor, till the next general court.

The governor and council have some share of executive power.—  
*d* They appoint the sheriffs in the several counties. *e* They are invested with the power of laying embargos, and for that purpose,

*a* Statutes, 27. *a* Ibid. 434. *b* Ibid. 106. *c* Ibid. 28. *d* Ibid. 213.  
*e* Ibid 46.



the governor with advice of council may issue a proclamation prohibiting the transportation out of the state by land or water, any article or thing, as they shall think necessary or expedient for a certain time, to be limited in the proclamation. *f* They may grant briefs, praying the charitable contribution of the people, to such persons as they judge the proper objects of charity, and without their approbation, briefs are illegal. *g* They are enabled to grant commissions of sewers, upon application made to them, by the major part of the proprietors of such lands as may be benefited thereby. They exercise the authority, every spring of appointing a day of public fasting and prayer, and prohibiting servile labour on such day. Their authority for this, is derived from immemorial usage and consent.

A day of public thanksgiving, is appointed by the legislature in the fall session, and the governor in both cases, issues his proclamation, requiring them to be religiously observed.

The lieutenant-governor, has the stile of, his honour; and has the power of justice of the peace, through the state. Each assistant has the same power.

II. Of the subordinate executive officers. And, 1. Of the Secretary. This officer is elected annually by the people, in the same manner as the governor. In the session of assembly, he performs the duty of clerk for the council, by making entries on all bills and petitions, of their votes. His office is created and his duty pointed out by statute. *b* That the secretary shall have the keeping and custody of the records, and other public papers, that contain the acts, orders, grants, and doings of the general assembly, and that relate to such matters and affairs, as are of general concern, and are to be recorded and kept in his office. He shall record all acts, grants, orders, and resolves made by the assembly, and give true copies when reasonably required. He shall within twenty days after the end of every session of assembly, publish in writing, under the seal of the state, the acts, laws and public resolves, and send them to the printer of the State of Connecticut, that they may be printed. He is keeper of the seal of the state, and is obliged to affix it to such laws, acts, orders, commissions, instruments, and

*f* Statutes: 12. *g* Ibid. 219. *b* Ibid. 228. *i* Statutes.

and certificates, as he shall by law be ordered to do, or shall be desired by particular persons, who have occasion therefor.

2. Of the Treasurer. *i* He is elected annually by the people, in the same manner as the secretary. And has the superintendence and care of the revenues of the state. The public revenue consists in the annual grant of taxes by the assembly, the duties upon writs, fines, and forfeitures for public offences, inflicted by the superior and county courts. The monies are all to be paid into the hands of the treasurer, who deposits the same in the treasury, which is under his care and management. He is obliged to keep a regular account of the public taxes, and monies which he receives—and his accounts are annually audited by persons appointed for that purpose by the assembly. *†* He must become bound with surety, in five thousand pounds lawful money, to the state, for the faithful discharge of the duties of his office, and to render his account when required. Which bond is to be taken by the governor and council, and to be registered and kept by their clerk. The secretary, and clerk of the superior court are bound annually to give him an account of all the fines and forfeitures belonging to the state treasury, and he may issue his warrant to the sheriff for their collection.

*†* It is provided by statute, that all demands against the state, not first liquidated and allowed by the general assembly, or by the governor and council, or house of representatives, or supreme court of errors, or by the superior court, or by a court of common pleas, by virtue of some express law, shall be liquidated and settled by the comptroller, who shall give orders on the treasurer to authorise him to pay the same.

When the assembly grant a tax, it is the duty of the treasurer to issue a warrant within three months before the tax is payable to the constables, who are collectors in the several towns, commanding them to levy and collect the same according to law.—Upon their failure, within four months after the tax, has become due, he is impowered to issue a distress to the sheriff of the county where the collector dwells, to collect the same of such negligent collectors.

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*i* Statutes.

*†* Statutes, 383.

*†* Statutes, 375.

The treasurer at the request of the selectmen of any town, may issue an execution in their name, directed to the sheriff of the county or his deputy, against a collector, at any time after the tax becomes due, that the money may be collected for the indemnity of the town, who are to pay the same to the treasurer, within four months after the taxes become payable, and on failure, execution is to issue against the persons and estates of the selectmen, and the inhabitants of the town.

Where no application is made by the selectmen to the treasurer, for an execution against the collector, and the execution issued against him is returned non est, or he becomes insolvent, then execution may go against the town. These proceedings are pointed out by statute, and the nature of these elementary enquiries will not permit a further discussion of this subject.

3. The comptroller, is appointed annually by the general assembly. He superintends and liquidates the public accounts. His office is created and his duty pointed out by statute, but as it is continued only from year to year, and is not considered as a permanent office, it will be unnecessary to consider it more minutely.

4. The sheriff is an officer of great importance in the executive department of government. The office is derived to us from England: but the power of it depends on statutes, which have considerably varied it from what is in England.

\* There must be a sheriff in every county, he is appointed by the governor and council—he must become bound before them, with two sureties, who are freeholders, in a recognizance of one thousand pounds lawful money, to the treasurer, for the faithful administration of his office. He receives a warrant from the governor, or in his absence from the lieutenant-governor, empowering him to execute his office. Any person may be appointed to this office, and no person is subject to any penalty, for refusing to accept an appointment. The office is held during good behaviour. The governor and council may displace him upon proper reasons, and he may resign his office at pleasure.

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The sheriff is considered as the principal officer in the county, and has great and extensive authority. It is his duty and in his power to preserve the peace of the county, and to suppress all tumults, riots, routs, and unlawful assemblies, by force and strong hand. He may officially and without warrant, apprehend all persons whom he shall find in the disturbance of the peace, and them carry before proper authority. He may command all proper persons within his county, to aid and assist him in the execution of his office. This is the same power that they have in England, and is called raising the posse commitatus, or power of the county.

In case of great opposition, or where he has reason to suspect it, he may with the advice of one assistant or justice of the peace, or more if they be present, raise the militia in the county, or so many of them as they shall judge needful, who are bound to yield obedience. The sheriff being invested with sufficient power to execute his office, and it being absolutely necessary, for the existence of government, that he should execute his office, he shall not return that he cannot do execution. The sheriff is bound to read the riot act, in all cases of riots.

He is authorized to serve and execute all lawful writs, to him directed, by lawful authority, and the power of water bailiff, is annexed to his office. He is bound to receive all lawful writs, when they are tendered to him within his county, and make return according to law, and the direction therein given: he must give a proper receipt for all writs, if demanded, and a receipt be presented without fee or reward, and on refusal, other persons may set their names to such receipt, as witness to the delivery. On neglect to execute or making false return, complaint may be made to the court or justice, to which such writ was returnable, who may enquire into the facts, set a suitable fine on the sheriff, and award just damages to the party injured. This statute gives all courts original and final jurisdiction, on all receipts for executions, granted on judgments, by them rendered.

The sheriff is by his office, chief keeper of the goal in the county, and has the charge and custody thereof, and may appoint such

keepers under him as he shall think proper, and is responsible for any damages that any person may sustain, by the escape of any prisoner from goal, by the fault or connivance of such keepers, or any other person that has the charge of said goal under the sheriff, and also for other faults and negligences of such under-keepers, in any matters respecting said trust.

The sheriffs have the power of constituting and appointing, a certain number of deputies, to act under them, who have the same authority as the sheriff, and who, as well as the sheriff must take the oath by law prescribed, before they are qualified to execute the office.

The sheriff has the liberty of deputing some meet person on special occasions, to serve and execute any particular process, which deputation, must be on the back of the writ, and the person deputed after serving it, must make oath before proper authority that he served the same according to his indorsement, and that he did not fill, nor direct any person to fill the same. The only instances where it is usual for sheriffs to make such special deputies, are where no legal officer can conveniently be had, or the person against whom the writ is, secretes himself, and keeps himself out of the way of known officers. In such cases, he deposes some person for that special purpose, so that there be no failure of justice. The sheriff or his deputy, may not draw, or fill up any writ, process, or declaration, nor appear as attorneys.

It is the duty of the sheriff to attend on all the stated courts within the county, to preserve good order in the court, and to execute their judgments. In all matters of a criminal nature, it is his duty to carry the judgments of the court into execution, by inflicting such punishment as they order.

5. Justices of the peace, may be considered as having some share of executive authority. It is their duty to conserve the peace of the county. When riots happen, they have power to read the riot act, and command the rioters to disperse. In case of disobedience, they have right to apprehend the offenders, and command any person to assist. The sheriff must take their advice in raising  
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the militia to quell riots. They, with the selectmen, constables, and grandjorors, nominate tavern-keepers. But their authority is chiefly of a judicial nature.

6. Goal keepers are appointed by the sheriff, for the immediate keeping the goal, and securing the prisoners. There are many other executive officers in the lesser divisions of the state, such as town and society officers—these will be considered, when we come to treat of towns, and societies, which are reserved for a special consideration, in the course of these enquiries.

#### CHAPTER FOURTH.

#### OF THE JUDICATIVE POWER.

**T**HE jurisdiction of courts of law is precisely defined, and limited by statute. We are perplexed by no disputes on this subject, and have occasion only to exhibit the several courts, from the highest to the lowest, by a concise abridgment of the statutes.

I. The Supreme Court of Errors, consists of the governor, lieutenant-governor, and council; in which the governor presides, and in his absence the lieutenant-governor, or if he be absent, the senior assistant present. Eight of the council constitute a quorum. This is the highest court of law in the state, and is the dernier resort in all matters of law and equity, brought by way of writ of error, or complaint from the judgment, or decree of the superior court, wherein the rules of law, or principles of equity, appear from the files, records, and exhibits of said court, to have been mistakenly adjudged, and determined. This court is holden alternately at Hartford, and at New-Haven, the first Tuesday in June. The secretary is their clerk. It is the duty of this court, to commit the reasons of their judgments to writing, which are to be signed by one of the council and lodged in the office of the clerk of the superior court. This court was instituted in 1784, previously to which time, the general assembly was the last resort.

II. The Superior Court consists of five judges, appointed annually by the general assembly. This annual appointment of the judges of the superior court, is the most exceptionable practice adopted in the state. Judges have no power to frame laws—they  
can

can only expound them. They can have no temptation to extend or misconstrue the law, to the oppression of the people, because they can derive no benefit from such misconduct. The responsibility of the legislature to the people, is the security that good laws shall be made ; but the judiciary are placed on a different basis. The security that they shall expound the laws justly, is their independence. Secure in their places, they can have no bias to deviate from the principles of justice, and they will equally resist the insolence of power, or the caprice of the people. They will equally regard the rich, and the poor. But, if they must court the favour of the legislature, or the smiles of the people to preserve their offices, such will be their state of dependence, that they may insensibly be led in their decisions, to bend the principles of justice, to a calculation of securing the favor of the persons most influential in their appointments. In this state it is apparent that where a case comes before the superior court, for trial between an influential character, who is usually a member of the legislature, and a poor man without influence, the judges have not that independence of situation, which is necessary to enable them to form an impartial decision. There is danger of the operation of a bias on their minds, to which they ought not to be exposed by the nature of their appointments. As they can have no inducement to extend their power, let them be independent, and they have no inducement to swerve from justice.

They ought to be appointed during good behaviour, and removable on impeachment for corruption, and misbehaviour. This will be a sufficient guard against mal-administration : but to avoid inconveniencies of another nature, it would be proper to declare that they should not hold their offices after they arrive to a certain age, and that such a state of infirmity as precluded the performance of official duties, should vacate their seats.

\* Their jurisdiction extends thro the state. They hold their courts in, and perform circuits thro every county. They possess a four-fold jurisdiction. They hold pleas of certain crimes. They have appellate jurisdiction in certain matters of a civil nature, from the courts of common pleas, and courts of probates. They have original jurisdiction in all matters of equity, where the sum exceeds one hundred pounds, and is less than sixteen hundred. They have jurisdiction

\* Statutes, 29.

**Jurisdiction by writs of error from the judgments and decreets of the courts of subordinate rank. I shall treat of each branch of jurisdiction.**

1. The criminal jurisdiction extends to all crimes, the punishment of which relate to life, limb or banishment, and to other high crimes, and misdemeanors, and to adultery. They have by statute jurisdiction of the crimes of blasphemy, atheism, polytheism, and unitarianism. Of robbery, burglary, forgery, counterfeiting, and horse-stealing. The expression of high crimes and misdemeanors, is of uncertain meaning, but the court have judged that under misdemeanors, they have cognizance of all crimes where the common law punishments of fine, imprisonment, and pillory are inflicted, so that they denominate the offences, misdemeanors at common law. • They have determined that they have cognizance of perjury.

2. The appellate jurisdiction is from the courts of common pleas, and courts of probate. Appeals lie from the courts of common pleas in all cases, wherein the title of land is concerned, or the value of the debt, damage, or matter in dispute, shall exceed the sum of twenty pounds; excepting it be a bond, or note, vouched by two witnesses. It has been adjudged that the sum demanded in the writ, shall not be the rule of determining the jurisdiction; but that the court will look into the declaration and pleadings, and if from the facts stated it is apparent that according to the rules of ascertaining damages, judgment cannot be rendered for a greater sum than twenty pounds, the appeal cannot lie: but where it may be a discretionary matter with the jury to find greater, or less damages, the appeal must be sustained. / In an action on book, the plaintiff averred that twenty pounds was due, and demanded twenty-five pounds, the court adjudged that no appeal would lie, because the plaintiff could not recover more than the sum he said was due, which was but twenty pounds.

9 In an action on note for fifty pounds, which appeared by the pleadings to be an arbitration note, and that the award was, that the defendant should pay the plaintiff eighteen pounds only, judgment being rendered by the county court for that sum, an appeal was taken, but abated by the superior court, because neither the

original



original matter of controversy, nor the award, amounted to twenty pounds, and the award was the only matter in dispute. *r* In an action on book, demanding thirty pounds, the book produced was for less than twenty pounds, and the county court refused an appeal, but on writ of error, judgment was reversed. The defendant in error offered to produce a certified copy from the clerk of the county court, where the book was lodged on file, that it was for less than twenty pounds, but the court said they could not take notice of it, unless it was made parcel of the record.

*f* It has been adjudged that if a note or bond for money only, be witnessed by two witnesses, and at the time of trial, either of the witnesses be dead, or become interested, so as to be excluded from testifying, that appeal will not lie; because by the reason of the death, or interestedness of the witness, the note or bond cannot be vouched in court by two witnesses.

*s* No appeals lie upon defaults, unless there was a hearing in damages, for otherwise the party is not supposed to be in court: but from every sentence by which the party is aggrieved, if he be in court, appeal lies, as from a judgment rendered upon *nihil dicit*.  
*n* No appeal lies to an adjourned court.

It has been determined that no appeal lies from the court of common pleas, in a *qui-tam* prosecution, for any crime, let the matter in dispute be of ever so great amount. *n* Formerly it was held that if the defendant was acquitted, the prosecutor should not be allowed an appeal, because no person shall be brought in jeopardy twice for the same crime: but if he was convicted, it was supposed that as the prosecution was of the nature of a civil action, he had a right to an appeal, if the sum in dispute exceeded twenty pounds. But in a late case of *Gilbert against Stedman*, the superior court decided that the defendant on conviction, had no right of appeal, and this judgment was affirmed by the supreme court of errors.

Appeals in all cases must be taken during the session of the court from whence the appeal is taken, bond with surety given, and the duty of six shillings paid. The appeals must be entered before the second opening of the court to which they are taken, unless the  
 appellant

*r* *Nelson vs Hammond*. S. C. 1793. *f* *Ripley vs. Fitch*, S. C. 1792.  
 Klr. Rep. 17. *n* *Ibid*. 366. *n* *Ibid*. 269.

appellant shall before the jury are dismissed, pay to the appellee all his cost in such case arisen to that time, which shall not be refunded, however the case may finally issue. But if the appellant do not enter the appeal, before the jury are dismissed, the appellee may afterwards, and have the judgment of the county court affirmed, with additional cost.

Appeals lie in all cases from the determinations of courts of probate, unless it be a judgment accepting the report of commissioners, in allowing the claims of creditors, to an insolvent estate, in which case it has been adjudged, that no appeal lies excepting the administrator be a creditor, and has an allowance made. In such case it has been determined that an appeal lies, because no person can contest his account at law, as he can the accounts of all other creditors. No appeal lies from a judgment on a report of auditors.

3. The superior court has jurisdiction of all matters in equity, that exceed one hundred pounds, and are less than sixteen hundred pounds, by petition originally preferred to them.

4. A most extensive branch of jurisdiction arises from writs of error, from the courts of common pleas, and justices of the peace. From all judgments of the common pleas and justices of the peace, a writ of error will lie to this court, for any error in law or equity, apparent on the face of the record. Error may be brought in all criminal cases, if it appear on the record. The time of bringing writs of error, is limited to three years.

This court has jurisdiction in all actions, that are necessary to carry their judgments into execution. Writs of scire facias on their judgments, and suits against officers who neglect to serve executions issued by them, may be brought directly to this court.

5. They have power to grant bills of divorce to married persons pursuant to statute : but this subject will be fully considered when we come to treat of husband and wife.

6. The superior court and in vacation, the chief judge, or any two assistant judges, upon complaint made to them, that any other court do exceed their jurisdiction, or hold plea in any matter of which, they have not cognizance by which the person suggesting is grieved, are empowered to grant a writ of prohibition, by them

subscribed as well to the party prosecuting, as to the judge of the court, who exceeds his jurisdiction, prohibiting them from proceeding any further, and the court is impowered to proceed from time to time thereon, and render judgment, and award cost according to law.

This writ is grounded upon a complaint from the defendant, stating the cause of action, and shewing that the inferior court exceed their jurisdiction, and are incompetent to try the action of which they claim cognizance. It is directed to the court as well as to the party prosecuting. If such inferior court are satisfied when they receive the prohibition that they have no jurisdiction of the action, they stop their proceedings; if not, then they make a return of the action to the superior court, which will be considered as a true return, on which the superior court will decide the right of jurisdiction. If they are of opinion that the inferior court had not jurisdiction, the judgment is that the prohibition shall stand; if otherwise, they grant a writ of consultation, which is a permission to proceed in the prosecution and decision of the action.

7. The superior court have decided that they have the common law jurisdiction to issue writs of mandamus to inferior courts and officers, to restrain them within proper bounds, and to oblige them to execute that justice, which their duty requires. \* They ordered a mandamus to issue to a town-clerk to record a deed. The party who moves the court for a mandamus, must state the facts necessary to support his motion, and make oath to their truth. Notice must be given to the adverse party to shew cause why the motion should not be granted. The first writ that issues, is a command to the officer or court to do the thing required, or return a sufficient excuse for not doing it. If the officer or court return an excuse which is deemed to be sufficient, the process is at an end: but if it be adjudged insufficient, then a peremptory mandamus issues, and if the officer to whom it is directed disobeys, he is punishable for a contempt of their authority, and they will grant an attachment to take and imprison him, till he obeys the order. Where a false return is made, the party injured, by the common law must have recourse to his action, in which large damages are given, if the return is found to be false.

By a statute in Great-Britain, of the 9th of Anne, the complainant has a right to traverse the return, which is tried by a jury, and if found against the officer, a special mandamus issues and damages are also given to the complainant. In this state, in Strong's case, the court directed that the statute of Anne, should be the rule of proceeding in trying the sufficiency of the return of the mandamus : but the contest was settled without a trial of the return.

8. The writ of habeas corpus, is a valuable privilege of the citizen, and is demandable of common right, for any person imprisoned under colour of authority, or without it, except the imprisonment be on execution, or on conviction of some crime. The superior court grant this writ, which must be directed to the person who has the custody of the complainant, with a command to bring him before the court, with the cause of his detention. This writ lies in favour of a wife confined by her husband, or for a servant, or child confined by their parents or masters. It will also lie in all cases of imprisonment by legal process, excepting on execution, and on conviction of crimes. When the person is brought forward before the court, with a return of the cause of his detention, the court will examine the matter, and if the detention be illegal, they may discharge him, or otherwise remand him to prison. When the court is not sitting application may be made to the chief judge, or in his absence to one of the assistant judges. If a husband should confine his wife, after she had been discharged by order of the court, he may be committed for the contempt.

The superior court has stated terms in every county, and the chief judge, or in his absence, any three of the other judges are empowered to call a special court, upon extraordinary occasion.—When the court cannot conveniently be held at the time or place appointed, any three of the judges may adjourn it to any other time or place in the county, or continue the actions therein pending, to the next stated term, giving notice to the sheriff under their hands, who shall proclaim and publish it in such manner as they shall direct. If any judge be present at the place and time for opening of the court, he may open and adjourn it. If none are present, the sheriff may adjourn till the next day, till the judges arrive.

When by absence of any of the judges or legal exception to them, there shall not be a sufficient number to hold the court, to try any case, the place may be supplied by any of the assistants. They have power to appoint and swear a clerk, and an assistant clerk, who shall have power to do every thing the office requires. The presiding judge in case of an equi-vote, has a casting voice.

The superior court on complaint, have power to disfranchise a freeman, for walking scandalously, and committing scandalous offences, and on reformation, may restore him. This power is too general, and the description of the crime too vague. It were better to designate the crimes, for which a freeman might be disfranchised, and not leave too much to the arbitrary opinion of a court.

It is the duty of the court in all matters of law, by them decided, on writ of error, demurrer, special verdict, or motion in arrest of judgment, that each judge shall give his opinion seriatim, with the reasons, and reduce the same to writing and subscribe it, to be kept on file, that the case may be fully reported, and if removed by writ of error, be carried up with greater advantage, and thereby a foundation be laid for a more perfect and permanent system of common law.

III. The courts of common pleas, or county courts are next in order. *z* These have two stated terms, or sessions annually, and may be adjourned as often as convenient, and called together as often as necessary. They consist of one chief judge and four justices of the quorum, who are annually appointed by the general assembly. In absence of the judge, the senior justice present presides, and either three make a quorum: in case of absence, or exception to the judge or justices, so that there be not a sufficient number to proceed, their places may be supplied by any of the justices of the peace in the county. They appoint a clerk who is sworn, and has power to grant attachments, summons, and replevins, to grant executions on judgments, and keep their records. In cases of an equi-vote, the presiding judge has a casting voice.

The jurisdiction of this court, comprehends matters of a criminal, of a civil, and of an equitable nature.

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*z* Statutes, 30.

1. The criminal jurisdiction by statute, extends to all crimes where the punishment does not relate to life, limb, or banishment, or adultery. These general terms would give them concurrent jurisdiction in sundry matters with the superior court; but perhaps the true distinction is, that the courts of common pleas have cognizance of all crimes beneath the jurisdiction of the superior court, excepting in cases where the statute gives concurrent jurisdiction, as for the crime of horse-stealing.

2. Civil actions principally originate before this court; they have therefore power to hear, examine, try, and determine; by a jury or otherwise, all civil causes, real or personal. All actions that exceed the jurisdiction of justices of the peace, are originally brought to this court. In all actions originally brought before justices of the peace, they have appellate jurisdiction, where the sum demanded exceeds forty shillings, and the bond or note is not vouched by two witnesses. They have final jurisdiction, unless by writ of error, in all cases wherein the value of the debt, damage or matter in dispute, does not exceed twenty pounds, and all actions on bonds, or notes for money only, vouched by two witnesses. No appeal lies in a suit against an officer for not serving an execution, or on a receipt for property on which execution was levied.

3. The equitable jurisdiction extends to all cases, wherein the matter in demand does not exceed one hundred pounds. A justice of the peace has no power in matters of equity, and the statute has fixed no sum, below which a court of equity cannot grant relief. No appeal lies in matters of equity, but writs of error may be brought to the superior court.

4. The courts of common pleas in their respective counties, have the superintendence and guardianship, of all idiots, distracted, or impotent persons, that have any estate, and may order and dispose of it, in such manner as they shall judge best for their support, and put the persons to some proper labour, or service, at the discretion of the selectmen, or they may appoint conservators to the persons and estates, of such idiots, distracted, and impotent persons,

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to provide for their support, and be accountable to the court for the management of their trust, when required : and on failure of personal estate to defray the expense of their support, the court may order a sale of the real estate.

5. The courts of common pleas in each county, and grandjurors there present, have power annually to grant and levy a tax as necessity may require, upon each town in the county, upon the lists of such year, to pay the debts and necessary charges of the county, which cannot be paid out of the fines and perquisites allotted for that end.

6. <sup>b</sup> The courts of common pleas have the power of admitting attornies to practice. In this state there are no grades in the profession, all of the profession, are called attornies, and when admitted by the court of common pleas in one county, may practice in every court in the state. The statute enacts, that the county courts in each county, may approve, nominate and appoint attornies, as there shall be occasion, to plead at the bar ; who shall take an oath before the court, and a record by the clerk shall be sufficient evidence of the admission. If they transgress the rules of pleading, established by the court, they may be fined not exceeding five shillings. They are to be under the direction of the court, before whom they plead, and for just reason may be suspended or displaced.

No person, except in his own case, is admitted to make any plea at the bar, in any court, unless qualified and admitted as an attorney according to law. This law has not been supposed to extend to justices of the peace, and before such courts, persons have been allowed to advocate causes, tho not qualified attornies. Where the title of land is not concerned, and the demand is not above ten pounds, one attorney on a side only is allowed to plead : and in all other cases, two and no more. There is no attorney-general in the state, but in every county, the court of common pleas, appoint an attorney for the state, who is to prosecute all cases in the county, in behalf of the state, both in the superior and county courts.

By the consent and practice of the courts and attornies, the  
mode

<sup>b</sup> Statutes, 10.

mode of introduction to the bar has been, that the candidates for admission, apply to the gentlemen of the bar, who either by themselves, or a committee appointed for that purpose, examine them with respect to their qualifications, in point of knowledge of the law and fairness of moral character ; and if they find them possessed of competent legal science, and of fair moral characters, they recommend them to the court, who direct the clerk to administer the oath by law provided. But otherwise, the bar will refuse to recommend them.

A rule has been introduced by the agreement of the attorneys in the several counties, that every candidate, whose education has been liberal, must serve as an apprentice, two years with some practising attorney, and every candidate, whose education has been common, must serve an apprenticeship of three years, with some practising attorney, before they are entitled to an examination, with respect to their qualifications, to be admitted to practice.

7. Courts of common pleas have power to lay out new highways, or alter old. The person making application, must give twelve days notice to the town, where the highway is, by causing a citation to be served on one or more of the selectmen. If no objection is made, or the objection is adjudged insufficient, the court may appoint a committee to enquire into the conveniency and necessity of the highway, and if found convenient and necessary, they may appoint a committee of three freeholders, to view and lay out, or alter the same, who must be sworn, must give notice to the selectmen, and twenty days warning on the sign-post ; they must lay the highway in the most convenient place, estimate the damages done to each person, and make return to the court, which being approved and recorded, the highway is established. The town where the highway is, must defray the expence, and on failure, a scire facias may be issued against the selectmen, and if no sufficient cause is shewn, execution may be awarded, with additional cost. If any individual is aggrieved by the doings of the committee, in laying out the highway, or estimating the damages, the court, before the acceptance of the report of the committee, may enquire into the matter complained of by a jury, if the party aggrieved desire it and grant such relief as the case may require : but if such application



application is groundless, the court may render judgment, and grant execution against the party applying, for the cost. The application for a jury, is the only mode in which individuals, who are affected by the laying out a new, or altering an old highway, can seek for redress : till that time, the controversy is between the petitioners, and the town : of course the court cannot have a discretionary power to grant a jury : the party aggrieved may demand it of right, and the court cannot refuse it. When a statute says, that a court may do a thing, it does not give them a discretionary power ; but the word *may*, is of the same legal import as *shall*.

A question has arisen with respect to the power of the court to alter highways. This distinction has been taken, that the court may alter, but cannot discontinue a highway. <sup>c</sup> In a certain case the county court laid out a new highway, and discontinued an old one, which passed by the house of a person, and who by the discontinuance, was shut from a public road. He brought his action against the man, who claimed to be the proprietor of the land, and who erected a fence, for a nuisance, in obstructing the highway, which was sustained by the superior court, on the principle, that the county court had no power to discontinue the old highway.

IV. Courts of probate, are constituted within certain districts, are held by one judge appointed annually by the general assembly, with the power of appointing a clerk. <sup>d</sup> Their jurisdiction comprehends the probate of wills and testaments, the granting of administration, the appointing, and allowing guardians, and the acting in all matters of a testamentary and probate nature. In any difficult or disputable case, the judge has power to call in to his assistance, any two or three of the justices of the quorum, in that county where the dispute arises. The judge has the power of fixing the place of holding his courts. In all cases, an appeal lies to the superior court except from a decree, accepting the report of commissioners, and then if the administrator be a creditor to the estate, and has a debt allowed him. The person appealing must give sufficient security to prosecute his appeal to effect. All persons that are of full age, and present, or have legal notice to be present at the court of probate, that shall give the judgment, sen-

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<sup>c</sup> Allen vs. Lyon, S. C. 1795.

<sup>d</sup> Statutes, 31.

tence, determination, denial, or order, must appeal to the next superior court. All other persons in this state, or the states of New-Hampshire, Massachusetts, Rhode-Island, New-York, and New-Jersey, and of full age, at the time the court passes the decree or order, shall within eighteen months afterwards, or within eighteen months after coming of age, into this state, enter their appeal from such decree or order.

e On appeals from the court of probate, it is in the province of the superior court, to fix the principles of the law, for the direction of the court of probate, but are not authorized to proceed through all the forms to a compleat settlement, as a prerogative court. The execution of the law, as ascertained by the superior, appertains to the courts of probate.

V. Justices of the peace, have jurisdiction both in matters of a criminal and civil nature. They are appointed annually by the general assembly, commissioned by the governor, and sworn: as their principal duty consists in preserving the peace and good order of the county, there is a proper number appointed in each town, whose jurisdiction extends through the county.

1. Their jurisdiction in criminal cases, extends to crimes where the penalty does not exceed forty shillings. And appeals lie to courts of common pleas for all crimes, but those respecting keeping taverns without licence, and selling lottery tickets granted by another state, drunkenness, prophane swearing and cursing, and sabbath breaking, and of these three last crimes, the ocular view of a justice or an assistant is sufficient evidence to found a conviction upon, and they may issue their warrant, apprehend the offenders, bring them before them, and convict on their knowledge. f He may also by the common law officially bind those to keep the peace who in his presence make an affray, who threaten to beat, or kill another, quarrel, or go about with unusual weapons, to the terror of the people and such as are brought before him by the sheriff or constable for a breach of the peace in their presence. But in all other cases presentment must be made by an informing officer.

The power of justices of the peace, is not so expressly defined

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c Kirb. 284.

f Hawk. P. C. 126:

respecting corporal punishments, as pecuniary penalty ; they can however, inflict no corporal punishment, but whipping, setting in the stocks, and imprisonment. For the crimes of drunkenness, and profane swearing, they may set the offender if he has not estate to pay the fine, in the stocks. For the crime of sabbath breaking, they may order the offender to be whipped, on his neglecting to pay the fine : and for stealing, if within their jurisdiction, they may inflict the punishment of whipping. An indian, negro, or mulatto servant, guilty of a breach of peace, may be by them punished with whipping, not exceeding thirty stripes. They may send to the house of correction, certain offenders, described in the statute respecting rogues and vagabonds, which will be fully considered when we treat of crimes. They may imprison for a contempt of court, or bind to the peace and good behaviour. They may grant sureties of the peace and good behaviour, against persons who disturb the peace, and on their refusing to find sureties, may commit them to goal.

When the offence is not determinable by a justice of the peace, he has power to recognize the offender, if the offence be bailable, with surety to appear before the court that has jurisdiction, and for want of bail, or if the offence be not bailable, he may commit the offender to goal. Hence it has become a common practice for grandjurors to present their informations, to justices for all offences : who cause the offenders to be apprehended, and proceed to make enquiry, and if there be probable evidence of their guilt, they recognize them to the proper court for trial ; if there be no probable evidence against them, they are dismissed.

If a justice of the peace find the evidence against the person complained of, to be insufficient to authorize him to bind him over to a court that has cognizance of the offence, he cannot subject him to the payment of cost ; for not having jurisdiction of the offence, he cannot render judgment for the payment of cost. And the law does not intend, that a person should be subjected to the payment of cost, where there is not sufficient evidence to hold him to trial.

Justices of the peace, have power to issue warrants, to be served in any part of the state, to apprehend and bring before them,  
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any person against whom complaint is made, of committing a crime, for which he ought to be brought before them for trial, or examination. He may likewise grant summonses, or capias for witnesses in like cases. Any sheriff, deputy-sheriff, or constable, to whom such process, summons, or capias shall be directed by name, and office, may serve it in any part of the state, where the person cannot be found in the official precincts of such officer. The authority may grant such precept if he judge necessary, to some suitable indifferent person, who shall have the same power to serve it as the legal officer. In all *qui tam* prosecutions, where the offence or demand exceed the jurisdiction of the justice, he has a right to recognize the defendant before the proper court for trial, upon the same principles as are laid down in public prosecutions.

2. The jurisdiction of justices of the peace, in matters of a civil nature, renders the office of much more importance in this state than in England, where they are confined to criminal cases. Their civil jurisdiction often renders it necessary, for them to determine questions of as much difficulty, as any that occur before the highest courts. It behoves a justice, who wishes to execute with fidelity the trust reposed in him, to become acquainted with the whole system of jurisprudence, and the general assembly ought to be extremely cautious about the qualifications of the persons they appoint. They ought to possess not only ability and knowledge, but candour and impartiality, above the influence of intrigue, and the prejudice of party.

Justices of the peace, have jurisdiction in all cases wherein the title of land is not concerned, and wherein the debt, trespass, damage, or other matter in demand, do not exceed four pounds, or if the action be on bond, or note, given for the payment of money, or bills of credit only, vouched by two witnesses, and the sum demanded does not exceed ten pounds; if the sum in demand exceed forty shillings, an appeal lies, except in actions on bonds and notes. A question has arisen, whether a note for more than ten pounds, could be indorsed within that sum, and no more than that sum demanded, so as to bring it within the jurisdiction of a justice; but it has been determined, that the face of the note gives the jurisdiction. ~~on~~, that an indorsement cannot alter it, for that may be a part of

the dispute, nor can a party wave part of his debt, to lessen it to the jurisdiction of a justice ; this ascertains the jurisdiction, and one party shall not alter it without the consent of the other. No appeal lies to an adjourned court. Bonds or notes vouched by two witnesses, and under ten pounds, if either of the witnesses should become interested, or die, will not be within the cognizance of justices, upon the principle adopted respecting appeals.

b A justice of the peace has no jurisdiction to try an arbitration note, if more than four pounds, tho less than ten pounds, and vouched by two witnesses, because the sum of the award is the rule of damages, and the note is not for money only, but in the nature of an escrow.

When an action of trespass is brought before a justice of the peace, and the defendant justifies by a plea of title, the facts shall be taken as confessed, the justice shall make a record of it, and take a recognizance of the defendant, that he will pursue his plea of title to the next county court, and shall certify the same to the court with the whole process.

i In all actions brought before justices of the peace, for raising or obstructing the waters of any stream, river, arm of the sea or creek, by the raising or continuance of any mill dam, or other obstruction, in which the defendant shall plead, that he has right to do the act ; an appeal lies from the judgment of the justice of the peace, to the next county court, upon giving good and sufficient bond with sureties, to prosecute the appeal, and in like manner, to the superior court.

A justice of the peace, has power to take and accept the confession and acknowledgment of any debt, not exceeding twenty pounds exclusive of the cost, from debtor to his creditor, either upon or without any antecedent process, as the parties shall agree, which can be done only by the debt or in person. Of which confession the justice must make a record, and may grant execution. \* It has been determined that the judgment should express the particular debt or duty, about which it is conversant, as bond, note or book, that the judgment may be a bar to an action brought for the same thing ; † and

b Desborough vs Desborough, S. C. 1789.

i Statutes 477.

\* Kirb 152. † Ibid. 136.

that the judgment must not be for more cost than his own fee, unless upon an antecedent process which must appear of record.

• It has been adjudged, that a justice of the peace cannot take a confession on an arbitration note, for he is to take confession only in case of a just and liquidated debt ; if the confession of judgment upon arbitration notes be admitted, the party can have no day in court to object against the award, let it be ever so irregularly made.

• It has been adjudged by the superior court, that a justice of the peace cannot go out of the town in which he dwells, to try a cause, unless there be no justices of the peace in such town, who are legally qualified to try the same.

The jurisdiction of justices of the peace, extends to the execution of the statute, directing proceedings against forcible entry and detainer : two assistants, or two justices, one being of the quorum, or one assistant and one justice, have the authority to enquire by a jury of forcible entries and detainers, of houses, lands, tenements, and other possessions, and cause the person who is forcibly dispossessed or held out of possession, to be repossessed.

Justices of the peace may administer the oath prescribed by statute, to poor debtors. If a justice of the peace, render a judgment, and before the same be satisfied, or execution granted, be removed by death or otherwise, the person in whose favour the judgment is, may bring action of debt at any time within five years, before an assistant, or justice of the peace, if it does not exceed ten pounds, if it exceeds ten pounds, the action must be brought to a higher court.

Justices of the peace are considered as the civil authority of the town, in which they dwell, and have extensive power in directing and advising about the management of the affairs of the town, which will be considered in the proper place. There are many other smaller matters within the jurisdiction of justices, as mentioned by the statutes, but which cannot be enumerated in an elementary treatise.

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A distinction is made between their judicial and ministerial office. In trying causes, they act judicially. In taking depositions, acknowledgments of deeds, and many other matters, they act ministerially.

This concise account of our courts of justice opens a prospect that must excite admiration and applause. The beautiful gradation from the lowest to the highest, the certain limits and bounds of their respective jurisdictions, the smallness of their number and the simplicity of the whole institution, exhibit, the most excellent system for the administration of justice, that has hitherto been adopted. From the supreme power the streams of justice issue, and are distributed through every part, and to every individual of the state. Justices of the peace are appointed in every town, to decide and settle the inferior controversies between the people. From their courts, appeals lie to the courts of common pleas, in each county. These courts besides this appellate jurisdiction, have original jurisdiction in all cases of higher importance. To avoid unreasonable delay, and that the expence of trial, may not surmount the value of the matter in dispute, all actions of a certain description are finally tried, and determined in these courts. But in actions of greater magnitude, and for the purpose that uniform justice may be diffused, and established thro the state, appeals may be taken to the superior court, which presides over the state, and holds courts in every county. By this method the same rule of right and the same principles of justice, are distributed to all the citizens, and the laws become uniform, consistent, and universal. That questions of law may be settled with the utmost precision, and solemnity, writs of error lie from this court to the supreme court of errors. To this court nothing appears but the facts as stated, and considered in the pleadings, which gives them the fairest opportunity to investigate, and decide the abstract principles of law, without that bias and prejudice which imperceptibly operate upon the minds of courts, who are equally concerned at the same time in the discovery of the truth of facts, and the determination of points of law.

This slight view of the system of our courts, must convince every  
person

person that it is the best calculated to avoid delay, and expence, and at the same time furnish the parties a fair, and reasonable chance to obtain justice, of any institution in the power of human wisdom to devise. That suits will be attended with expence, and that delays will sometimes necessarily happen, cannot be denied. A thousand causes will intervene, to render delays justifiable, and create expence. But if this delay does not arise necessarily from the institution, but is admitted, and calculated to promote justice, by giving a fair opportunity to prepare for trial, it cannot be deemed a fault, but must be acknowledged to be an excellence. In this state no delays arise from the institution of our courts, which the party can take advantage of, to put off the trial, tho not necessary to enable him to prepare for it, as is the case in England, and most other countries. But every action comes regularly to trial, at the term to which it is brought, unless good reasons can be given to induce the court to order a delay. In the administration of justice, it is true that unnecessary and unreasonable delays, may happen, but this must be attributed to the imperfection of human judgment, and not to any defect in the institution. But it is easy for by-standers who view only the superstructure, without understanding the groundwork, to censure as faults, what they would admire as beauties, if they could comprehend the whole plan. So mortals, who have but a partial prospect of the system of the universe, consider that to be evil, which if they could fathom the councils of eternity, they would pronounce the most perfect good.

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#### CHAPTER FIFTH.

#### OF COUNTIES.

**T**HE state is divided into eight counties for the more convenient administration of justice. *p* In every county town, court houses and goals, must be erected and kept in repair. The assistants and justices of the peace in the several counties, are empowered to tax the inhabitants, for building, repairing, and furnishing the court houses and goals : and are from time to time, to order, direct and  
take



take care of the goals, and keep them in repair. The county courts may appoint collectors in the respective towns, who for refusing to accept the office, are subjected to a penalty of forty shillings; and the collectors have the same power and fees, as the collectors of state taxes, and failing to make collection and payment, the treasurer of the county may issue his warrant to some proper officer, to levy and collect of them, such sums as may be due.

All persons committed to goal for any crime, must, if they have estate, defray the expence; if not, may be disposed of in service for that purpose. All prisoners are permitted to provide what food they please, and send for it where they please, and to use bedding, linen, and other necessaries as they think fit, neither shall the goal keeper demand greater fees for commitment, discharge, and chamber room, than what is allowed by law: and for any offence therein, he shall pay treble damages to the party injured, and be subject to such fine as the court shall see fit to inflict. The prisoners for debt, and felons shall not be lodged in the same room, in the prison, and if the goaler or keeper of the prison, shall offend herein, he is liable to pay treble damages to the party grieved.

The county courts have power to fix and establish certain limits adjoining the prison, which constitute the liberties of the prison, and the sheriff has discretionary power, to take bonds of prisoners confined in civil matters that they will not depart the limits of the prison, and then they may be enlarged.

The county is responsible for all escapes of prisoners, thro the insufficiency of the goal; and in case there be no money in the treasury, they may tax the inhabitants, appoint collectors, and enforce the collection; but no process will lie against the county, in any case but for an escape. The judges of the county courts may summon together the assistants and justices of the peace, the major part of whom have power to build work-houses in each county, and levy taxes to defray the expence. The county courts have power to appoint overseers, and masters of the work-houses, and to do every thing necessary to accomplish the business.

The several goals in the counties are made work-houses, or houses of correction, till work-houses are erected, and the keepers of  
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the goals, or such persons as they shall appoint, are masters, or keepers of the goals, as houses of correction, with all the power of masters of houses of correction; and all persons ordered to be sent to the house of correction, are to be received, and kept in the goals, as houses of correction, till such houses are built, in consequence of this provision, no houses of correction have been erected, and the goals are used for that purpose.

The masters are to keep the persons sent to the house of correction to such labor, as they are able to perform, for the time they are ordered to continue there. To compel\* them to perform their tasks, or if they are disorderly, stubborn, or idle, they may punish them by putting fetters, and shackles on them, by moderate whipping, not exceeding ten stripes at a time, or may abridge them of their food, as the case may require, till they are reduced to better order and obedience. For escapes, the prisoners may be whipped, not exceeding thirty stripes.

*f* The state furnishes materials for the labour of those who do not belong to any town in the state; if they belong to any town, the selectmen are to provide at the expence of the town; and if they are stubborn children, or servants, their parents or masters must pay the charge of such materials, if able; each offender is allowed two thirds of his earnings for his support, and the overplus is to be accounted for by the master of the house. If heads of families are committed, the profit of their labor, or so much as the county court shall think necessary, may be applied to support their families. In case of sickness, or inability to work, the keeper must support them, and the expence is to be reimbursed by those who are bound to pay for the materials for their labor. The master, or keeper is to be allowed reasonable compensation, is to settle his accounts with the county court, and may be punished at their direction for any neglect of duty.

The county courts appoint a treasurer, who can pay out money only by their order. He superintends the collection of county taxes, and may issue warrants for that purpose. He must issue warrants for the collection of all fines and forfeitures, belonging to the county treasury, in one year after they are imposed, on penalty

of forty shillings. He must keep weights and measures in the county town, as standards for the county, to be sealed by the state standard.

The liability of counties to respond damages for the escape of prisoners, thro the insufficiency of the goal, may with propriety be considered in this place.

The statute provides, that if any person lawfully committed, shall break goal, and make his escape by reason or means of the insufficiency of the goal, the damages sustained by reason of such escape, shall be paid out of the county treasury, with a saving that nothing in the act shall be construed to prejudice, or hinder any person or persons, from recovering any expence, cost or damage of the person or persons, or out of the estate of such person or persons, who shall be aiding, or assisting in breaking the goal, or who shall escape or be aiding thereto, and when such remedy or satisfaction may be had, the county shall not be charged with, nor ordered to pay the said expence, cost, or damage.

In England the sheriff provides the goal, and of course is responsible for any escape by reason of its insufficiency. But in this state, as the county are obliged to provide the goal, the sheriff is only accountable for the custody, and the county are liable for escapes by reason of its insufficiency. It is of importance to public justice, and the peace of society, that prisoners should be securely kept. It is therefore established, as a general principle, that the county shall be responsible for all escapes by the insufficiency of the goal, that do not happen by fire, public enemies, or the providence of God. Against these, it is unreasonable to require that counties should provide. This reduces the point of insufficiency to a certainty. It will be in vain to say that the goal was erected of sufficient strength, because it appeared to be sufficient to restrain common persons, and the prisoner escaped by uncommon means. If he were able to make his escape in any other manner than by reason of fire, public enemies, or the providence of God, the law determines the goal to be insufficient.

It is therefore no excuse for the county, that the prisoner broke out

out by the help of implements handed in at the window. It is their duty to provide a sufficient goal, which they do not, if prisoners can break out of it with or without implements. If the goal is left accessible to persons without, and is of a construction and materials, that by the secret use of implements, it can be broken, it is not the place of security which the law intends. It is the sheriff's duty to defend the goal against open and riotous attempts, but it clearly devolves on the county so to build, and secure it, that it shall not be liable to be broken secretly, without the knowledge of a vigilant keeper.

If persons aid, and assist the escape of a prisoner, and have sufficient estate to pay the damages, and are known to the creditor, he must first seek his remedy against them, but if they are unknown to him, or unable to respond the damages, his challenge is directly upon the county.

The statute makes no provision in favour of the county, upon recaption by fresh pursuit. It would seem, however, reasonable, that in such cases the principles of the common law ought to apply; but if the recaption be after the commencement of the suit, it will be no excuse by the common law.

The statute enacts that the cost and damage shall first be justly ascertained and allowed, and the county ordered to pay it. Upon the idea of a just ascertainment of the cost and damage, the courts have adopted a construction, that enquiry may be made with respect to the ability of the prisoner, who has made his escape, to pay, and if he had taken the poor prisoners oath before his escape, and was wholly unable to discharge the debt, then they say that no cost, or damage has accrued to the creditor, by the escape, and that the county in justice are not liable to pay the debt for which he was confined; but if there be proof, or a probability that the prisoner could have paid all, or any part of the debt, they will order the payment of such sum as shall appear to be just and reasonable under the special circumstances of the case, and that special damages are only to be given, instead of the whole sum for which the prisoner escaping was committed.<sup>1</sup>

The application is by a petition to the court of common pleas in the county, where the escape happened ; but if any party be aggrieved by the denial, or determination of the county court, they may appeal to the superior court, who may hear, and determine the same, and order the payment of such damages, and cost arising on the appeal, as they judge reasonable.

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#### CHAPTER SIXTH.

#### OF TOWNS AND TOWN OFFICERS.

THE impossibility of collecting all the people in one body, to elect their rulers, and the difficulty of exerting sufficient energy to govern the state, while it remains a single corporation, has rendered necessary, a number of subordinate divisions. Connecticut is divided into a number of small corporations, called towns. The extent of territory, and the number of inhabitants in each, are such, that they may conveniently assemble to elect their rulers, and manage their common concerns and interest. These corporations are vested with certain powers and privileges, for their internal regulation and government. All the inhabitants convene, they have a right to elect their own officers, and possess some power of a legislative nature. Here we may behold an epitome of a pure, unmixed, democracy, and it is here, that the people have the direct and immediate exercise of their power, and privileges as freemen.

As towns are created by statute, which are clear and explicit, it will be unnecessary to treat of them at large. I shall only give a general account, for the purpose of exhibiting a complete view of the government of the state, which will be more easily acquired in this way, than by reading the statutes in an alphabetical arrangement. I shall handle the subject under the following divisions. 1. Of the powers of towns. 2. Of their meetings, and the regulations of them. 3. Who may vote in town meetings. 4. The officers of towns, with their power and duty.

1. Of the power of towns. They are communities or corporations—capable of suing and being sued, of prosecuting and defending

sending in any action. They have power to make such orders, rules, and constitutions, as concern the welfare of the town, provided that they be not of a criminal, but of a prudential nature, and that the penalties exceed not twenty shillings for one offence ; and that they be not repugnant to the laws and orders of the state. All votes, acts, and orders of the town, shall be made by the major part of the qualified voters there present, and being so made, shall be deemed the act of the whole. They have the general power to do all acts that are necessary to promote their interest, and defend their rights.

They have the power of appointing such officers as will be hereafter enumerated. They must support their poor. They may lay taxes to defray their expences and pay their debts, and may appoint collectors. They must repair highways, and for that purpose, may divide the town into districts. They must maintain and keep up necessary bridges.

If any person lose his life, by the defect or insufficiency of any bridge or highway, after warning given to any of the selectmen in writing under the hands of two witnesses, or a presentment to the county court, the town shall pay a fine of one hundred pounds, to the parents, husband, wife, child, or next of kin, to the person deceased. If a person lose a limb, break a bone, or receive a wound, by means of such defect, the town shall pay to him double damage ; so for an injury to any team, cart or carriage, horse or other beast, or loading, double damages are recoverable.

Upon complaint made of any town, to an assistant or justice of the peace, they are empowered to issue a warrant to the constable, to impress such workmen in their town as may be necessary to secure and repair any defective bridge or passage, which shall be paid by the town who ought to maintain the same. If a town neglect, or refuse to build, or repair a bridge across a river in the highway, or if towns neglect, where the river is the dividing line, it being their joint duty, on complaint by any person to the county court, they may enquire by a committee or otherwise into the necessity of the bridge, causing notice to be given to the selectmen, to shew reason why they should not be compelled

led to make or repair such bridge, and if no reason be shewn to the contrary, and such towns still neglect, said court may appoint some proper person to do it, and award execution for the expense against the town.

" It has been adjudged by the superior court, that an action will lie at common law, against any town, for damage done by the defect of a bridge.

" In an action on the statute respecting bridges, against a town, in which the plaintiff declared that he lost a horse &c. in attempting to pass a bridge, by the deficiency thereof, which the defendants were bound to keep in repair, and had notice that the same was out of repair, it was decided, that it was not necessary that notice should be given in writing to the town, to recover double damages, and that such notice was necessary only where a life was lost, and the action was to recover the forfeiture of one hundred pounds.

2. Of town meetings, and the regulations of them.—These are held by warning, or notification from the selectmen, on such occasions and at such times as their interest requires,—but four days notice must be given. They are bound to hold meetings annually in the month of December, to elect their officers: when the inhabitants are convened, they proceed to the choice of a moderator, to preside in the meeting. No person has a right to speak without his liberty, unless it be to ask liberty to speak. The moderator has the power to keep good order and command silence. All disturbances in such meetings, by preventing the choice of a moderator, abusing him when chosen, or refusing to keep silence when commanded, are punishable by a fine of five shillings, and if the offence be aggravated by some notorious breach of the peace, the offender may be bound to the next county court, who may impose a fine not exceeding ten pounds. And no meeting can be adjourned, but by the major part of the members present.

3. The persons who may vote in town meetings, are all freeholders, and lawful inhabitants, that have a freehold estate rated in the common list at fifty shillings, or personal estate at forty pounds

" *Eldridge vs. Town of Pomfret*, S. C. S. C. 1792.

" *Swift vs. Town of Keat*:

- pounds, besides his poll, and that are twenty-one years of age. All other persons that presume to act, vote, deal, or intermeddle, are liable to a fine of fifteen shillings for every offence.

4. Of town officers with their power and duty, and 1. The selectmen, consisting of a number of the inhabitants, not exceeding seven, who take care of, and order the prudential affairs of the town. They are by office, overseers of the poor, and each town being obliged to take care of and maintain their own poor, this becomes a principal part of the duty of the selectmen.

The selectmen are bound to provide necessaries for all the inhabitants of the town, who are incapable of supporting themselves. Towns are obliged to support their respective inhabitants, whether living in the town to which they belong, or any other town, either with or without a certificate, who may need relief. If any person belonging to any other town, shall by sickness or otherwise be reduced to necessitous circumstances, it is the duty of the selectmen of the town where he is taken sick, to provide for his support, and they may lay an account of the expense before the county court, in the county where the town is, to which such person belongs, who having adjusted the same, may order the town to pay it, and grant execution accordingly, or the town may bring an action at common law, for the recovery of such expense, provided that such persons have not any estate, and no parents or masters, or any relations that are bound to support them. And if they have, then the expense is recoverable of those persons who are bound to provide support.

But if any person that has not gained a legal settlement in the town, shall by sickness or otherwise, be reduced to necessitous circumstances, then if any inhabitant of the town or other person in the town where such person is in want, have entertained him for the space of fourteen days without giving sufficient notice thereof, to the selectmen of the town, then such inhabitant, or such other person, shall support and sustain the whole expense—but if notice be given by such person within fourteen days to the selectmen, he is excused. The severe provision of this law, renders it necessary for people to be cautious about entertaining poor strangers: for if a poor person belonging to neighbouring town, that has relations to support



support him, or the town is bound to support him, or if he belong to any of the United States, excepting this state, or if he be a foreigner, shall be entertained more than fourteen days, without notice given to the selectmen, the entertainer must defray the expense, and can have no remedy to recover it from the relations, or the town that ought to support the person, or from the town where he is sick.

If any person not an inhabitant of any town in this state, shall be permitted to reside in any town, for the term of three months, without being warned to depart therefrom, notice being given to the selectmen, by any individual within fourteen days, if any have entertained him so long, then if such person be reduced to necessitous circumstances, by sickness or otherwise, such town must defray the expense.

But if the town have warned such sick and indigent person, within three months to depart the town, then the expense shall be defrayed out of the treasury of the state, by order of the governor and council : but no expense is paid by the state, excepting what arises within the three months after such stranger comes into the town, and within which he has been warned, unless it be expense incurred by sickness, or lameness, that commenced within the three months and continued after that time : and then the expense thus incurred, until the time that the person shall so far recover of his sickness, or lameness, as to render it safe to remove him, shall be defrayed by the state. But in all cases, as well of foreigners, as persons belonging to any of the United States, if they are permitted to reside in any town, after they have so far recovered as to be removed with safety, and are again taken sick, or who shall be permitted to reside in any town after three months, and then shall be taken sick—the town where they are suffered to reside, must defray the expense, and cannot call upon the state. This renders it necessary for towns to be careful about suffering persons not belonging to any town in this state, to remain there longer than three months, or after they have recovered from sickness, that commenced within three months, as they take upon themselves the burden of their support, in case they are reduced to want. But this provision of  
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the law is well calculated to save expense to the state ; for towns will be much more cautious about suffering foreigners to reside in them, when they can recover no maintenance from the state, only for sickness, commencing in three months after their coming : and the treasury will not be drained by those enormous bills, which towns are frequently too willing to entrance, because they are paid by the state. These regulations for the support of the poor extend to every case that can arise, unless perhaps there may be exception, where it so happens that the person who entertaining a poor stranger fourteen days without notice, is unable to support him ; then the law has made no provision for his support ; in every other respect the law has made provision for the support of the poor, so that every one may know where to call for his bread in the hour of want. This liberal and general provision of the law, has in a great measure superseded the necessity of the exercise of the God-like virtue of charity, but the benevolent may find many instances of private distress, which the law does not relieve to call for the acts of generosity. It may however be remarked, that the straggling beggar is generally to be suspected, for he who does not accept of the provision made by law, but prefers roving round the country to collect what he can, by exciting the compassion of the people, acts upon the principle of a knave, and such is so generally the character of those wandering mendicants, that the most liberal mind, will bestow upon them with a cautious hand.

It is the duty of the selectmen to warn persons not legal inhabitants of the town to depart the town, to procure them to be transported to the places where they belong, and to prosecute them when they neglect to depart the town on being warned.

Where there are any persons who have been, or are maintained by the town who suffer their children to live idly, and mispend their time, or neglect to bring them up, or employ them in some honest calling, or if there be any family who cannot, and do not make sufficient provision for support of their children, or if there be any children who live idly, and are exposed to want, having none to take care of them, then the selectmen with the assent of the next assistant or justice of the peace, are empowered to bind them out to

be servants or apprentices, males till they are twenty-one, and females till they are eighteen.

\* A boy having no father, guardian, or master, lived with his mother who had married a second husband where he was well provided for, and educated—Three of the selectmen of the town, there being five, bound him an apprentice, one of which, being a justice of the peace approved of the indenture which was afterwards approved by another justice of the peace. It was determined that the boy under such circumstances was not liable to be bound out by the selectmen, what the selectman who was a justice could not act, at the same time in both capacities, which rendered the indenture void at the time it was pretended to be executed, and that a subsequent assent by another justice of the peace, could not make good what was originally void. The fairest and most reasonable construction of the statute is that the selectmen shall not bind out as apprentices, children unless they, or their parents are actually supported by the town.

The selectmen are to inspect the conduct of families in the education of children, and see that they instruct, or cause their children to be instructed to read the English language, to know the laws against capital offences, and to learn the rudiments of religion. If parents, or masters after admonition, shall neglect their duty and the children grow rude, stubborn and unruly, then the selectmen by the advice of the next assistant, or justice of the peace, are impowered to take such children, or apprentices, and bind them out so that they may be instructed, and governed, males till they are twenty-one and females till they are eighteen. The selectmen together with the civil authority are visitors of the schools. They have power to suppress riots, and read the riot act.

It is the duty of the selectmen to inspect the affairs and management of all persons in their towns; and if they find any who are reduced, or who are likely to be reduced to want, by idleness, mismanagement, or bad husbandry, they may appoint an overseer, to advise, direct, and order him for such time as they shall think proper. A certificate of which they must set upon the public sign-post

post, and lodge a copy in the office of the town clerk; by which such person is rendered incapable of making any contract, without the consent of such overseer. If this method fail to reform such person, or without appointing an overseer, if judged proper, the selectmen may make application to the next assistant or justice of the peace, who may issue a warrant to apprehend him for examination, and to be dealt with according to law. If the person abscond, or cannot be taken, then the officer shall serve the warrant by leaving a copy at the last place of his abode. After this proceeding the selectmen, if no sufficient reason be offered to the contrary, with the advice of said assistant, or justice of the peace, are empowered to take such person, and his family under their care, and assign, bind, and dispose of them in service, as they shall think best. They are authorized, by the advice of said assistant, or justice, to take into their hands all the estate, both real and personal of such person, and the same dispose of, and improve for the benefit of such person or his heirs; but may not sell lands without liberty of the general assembly. A certificate of their proceedings shall be set on the sign-post, and lodged with the town clerk, and within ten days an inventory of all the personal estate appraised by indifferent men under oath, shall be made, and lodged with the town-clerk. If any person withhold the estate, or credits of such person, the selectmen are empowered to recover the same by suit, or otherwise, and inventory the same; and they are to pay all just debts. Such person is disabled from making any contract, that shall be valid in law. He may apply to the county court, if aggrieved with the doings, who upon hearing the case, have power to afford such relief as they think proper.

This mode of proceeding is peculiar to this state, and some part of it hardly compatible with the ideas of freedom. For the selectmen to take a man, with his family, and all his estate into their custody, and assign the man, and his family in service, and improve his estate as they please, is the exercise of a power, that the good of society cannot require, and which is repugnant to our ideas of civil liberty. There have been few instances where this power has been exerted, and where it is, the consequence generally, is the

very ruin of the family, and destruction of property, which the measure is intended to prevent. Perhaps the appointment of an overseer to prevent a person from making imprudent bargains, may sometimes answer a salutary purpose : and probably all the purpose that ever can be effected by all the restraint upon the natural liberty of man, which the whole of this process contains.

9 We find a similar regulation was adopted by the Roman law, for where they found a man prodigal to that degree, that there was danger that he would squander away his estate, the magistrate interdicted him the administration or management of his estate, and committed the care of it to a curator, and then such person had no power to make contracts.

The selectmen, together with the civil authority, constables, and grand-jurors, annually meet some time in January, and nominate proper persons to keep houses of public entertainment in their towns the ensuing year, and also to nominate jurors. If any person who is nominated to be a tavern-keeper, shall neglect to take out licence, or be denied licence by the county court, or shall remove, or be legally suspended, or if an addition to the number shall be judged convenient and necessary, they may on proper notice, convene at any other time within the year, and nominate proper persons. They shall certify such nomination to the next county court.

The selectmen, together with the civil authority, are to inspect the conduct of tavernkeepers, and if from their own observation or the information of others, they find that they do not observe the law, they may cite them before them, and examine into the matter by proper evidence. If they find the tavernkeeper in fault, they may admonish him, or if they think proper, they may suspend his licence, till the next county court, and shall cause a copy of such order of suspension to be left with the taverner, and his house shall be under the same restraint as unlicensed houses. A certificate of these proceedings shall be sent to the next county court in the county. The selectmen, with the civil authority, and grandjurors, may post tavern haunters, by setting up their names at every tavern in the town, and prohibiting every tavern-keeper from entertaining or suffering them to have any strong liquor.

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The selectmen may lay out public highways, or private ways, as they shall judge needful, in the town, giving reasonable notice to the owners of the land thro which they are laid, or leaving notice in writing at the place of their abode, if within this state. The damage shall be paid by the town, if the highway be for public use, but if for private use, by the persons applying. A survey in writing, signed by the selectmen, and containing a description of the road, must be accepted by the town, and recorded in the records of lands, and satisfaction made to the persons damnified, or the money be deposited in the town treasury for their use, ready for them when they apply, according to an estimate made by three judicious disinterested freeholders under oath, appointed by justices of the peace, or as the selectmen, and parties interested agree; then the highway becomes established. The party aggrieved in any respect, may apply in eight months to the county court, who may appoint a committee or jury to enquire, and grant relief, either by discontinuing such highway, or private way, or increasing damages. If any person thro whose land such way passes, shall declare himself aggrieved, the same shall not be opened till the expiration of twelve months, to give him time to apply to the county court.

The selectmen with the civil authority, have power to make proper regulations respecting mad dogs.

When a woman that has a bastard child neglects to bring forward a suit for maintenance, or commences a suit, and fails to prosecute to final judgment, the selectmen of any town interested in the support of any such bastard child, where sufficient security is not offered to save the town from expense, may bring forward a suit in behalf of the town against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child. They must appoint two or more persons to renew the bounds between their towns, and the adjoining towns, at least once a year in the months of March, April, October or November. The selectmen of the most ancient town must give notice to the selectmen of the other towns of the time and place of their meeting for perambulation six days before-hand on penalty of four pounds.

The select men have certain powers vested in them to prevent the

the spreading of contagious sickness, as prescribed by statute. They may give certificates of the qualifications of persons to be freemen, under a penalty of three pounds six shillings, for a false certificate. It is their duty to erect, and keep up mile-stones, on the road, marked with the distance from the county town on penalty of forty shillings, and to erect stocks, and sign posts: it is their duty to see that all town officers who are chosen, of whom an oath is required, are summoned and sworn according to law. They may assess the town to raise money to defray expenses, in doing what is required by law if the town neglect to do it. They are to procure at the expense of the town, and keep standard weights, and measures, tried and sealed by the county standards, on penalty of forty shillings. They are to settle and adjust accounts against the town, and may draw on the treasurer for payment.

2. The town clerk, or register must be sworn, and his duty is to enter and record all town votes, orders, grants and divisions of land; to record all marriages, births, and deaths of persons in their towns, and to record all conveyances, and mortgages of houses, and lands lying in such town, which shall be presented to him. He is to note on the conveyance, or mortgage, the day, month and year of receiving them, and the record shall bear the same date. When there is no assistant or justice of the peace, residing in a town, he may administer the oath to town officers. They are annually in May to send to the treasurer of the state, the name of the persons who is chosen constable, to collect the state rate. They shall enroll the names of all persons who are admitted freemen.

\* It has been adjudged that a town clerk being a public officer, having received a deed for record, may not suffer it to go out of his hands unrecorded, and if he does will be liable to any person who shall receive prejudice thereby.

3. The town treasurer must be sworn, and they have power to receive all monies, that shall become due to the town, by rates, fines, assessments, or otherwise and shall pay and deliver out the same according to the order of the town, or selectmen, keeping an account

\* Willard, vs. Hutchinson, S. C. 1794.

account of the receipts and deliveries, and accounting with the town, or selectmen, at least once a year. It is the duty of the treasurer to apply to the civil authority, for an account of all such fines, and forfeitures as shall be recovered by judgment before such authority, belonging to the treasury of the town, where such judgment is given, at least once a year and receive the same for the town.

4. Constables must be sworn. The town may elect a proper number to do the business. Their power is restricted to the town for which they are appointed, in which they have the same as sheriffs in the county. They may raise, put forth, and pursue hue and cries to effect. They may without warrant, apprehend such as are guilty of drunkenness, prophane swearing, and sabbath breaking, also vagrant persons, and unseasonable nightwalkers, provided they are taken on sight of the constable, or present information of others. They may make search for all suspected persons, on the sabbath or other days, in any other suspected places or houses, and apprehend and keep in safe custody, till opportunity serves to bring them before the magistrate, or justice of the peace. It is their duty, as aforesaid, to search all suspected places for tiplers. The first constable chosen by the town, is also chosen collector of state taxes, which devolves upon him an additional duty. Upon receiving a warrant from the treasurer, he is to appoint the time and place for the inhabitants of the town to pay their rates, and shall give reasonable notice to them, and on their neglect to pay, then he has power to levy on their personal estate, if any can be found, if not, he may take real estate, or he may levy upon the body of such person, and commit him to goal. His warrant to collect the rates becomes an execution, and he must proceed with it accordingly.

• In an action against a town for the default of a constable in not duly serving a writ, he being a bankrupt, and in failing circumstances, at the time of his appointment, it was adjudged that towns are not responsible for the conduct of constables, whom they appoint, for they have no power to controul them or to require them to find surety, and are bound by law to appoint them.



5. Surveyors of highways. The towns as often as they judge necessary, at their annual meetings may vote and agree, that the selectmen may lay out to each surveyor, his district, and what persons shall labour under such surveyor, and to alter such districts as occasion may require. When such divisions are made, it is usual for the towns to appoint a surveyor in each district, who must be sworn, and who have a right to call out all persons in the town from sixteen years of age to sixty, including indian, melatto, and negro servants, or slaves, excepting magistrates, justices of the peace, gospel-ministers, ruling elders, allowed physicians, constant school-masters, and millers, two days at least in a year, if their need be, and as many more as he shall judge necessary, which persons are to be directed by the surveyors. They may warn out teams. Three days warning must be given, before the day appointed for such employment. If any person neglect such service, after warning, it is the duty of the surveyor to make presentment to an assistant or justice of the peace, of such persons and their neglect, and if such persons do not in one week give sufficient reasons for their neglect, to such assistant or justice, he shall grant and levy a forfeiture of two shillings and three pence per day, for a man and double that sum, for a man and team, which shall be delivered to the surveyor, who shall lay out such monies on the highway, and if the surveyor neglects to warn out or to make presentment of neglects he shall incur a like forfeiture. The surveyors have power to clear water courses through lands adjoining to highways, for the purpose of draining off water from highways. Many towns have obtained the privilege of repairing their highways by taxes : in which cases they lay taxes in town meetings and the surveyors are also collectors, and either collect the money, and lay it out in repairing the highway, or oblige every person to labour to the amount of his taxes.

6. Listers consist of such number, as the town think proper to appoint, and are to be sworn. In July annually it is their duty to notify the inhabitants to bring in lists of the estate they own on the twentieth of August by the tenth of September, who on failure, are liable to be fourfolded. The listers are to transmit the sum total of the lists to the general assembly in October, on penalty of  
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ten pounds to the state treasury : and all additions in May, when the grand list of the state is completed, on which the public rates are laid. The listers are to lodge the lists of the town with the town clerk in January, on penalty of ten pounds to the town. And if no return be made to the general assembly, the town may be doomed at the discretion of the assembly.

If the listers overcharge any person, he may before the 20th of April following, make application to two justices, and three selectmen, who may grant him relief.

The list is made out by specific rates at which the polls, and estate, both real and personal, of the inhabitants are liable to be set, and by discretionary assessments of the listers on certain professions of business. An equal mode of taxation, is the great desideratum in government, as all ought equally to contribute to the support of that government that affords them protection. Many have been the efforts in this state, to accomplish this plan, and various are the schemes, that have been devised, but none has been yet adopted that gives universal satisfaction. It is probable on a full investigation of this subject, it will be found impossible to frame a mode that in its immediate operation, will compel every member of the community to contribute to the support of it according to the value of his estate, and it will be found to be a matter of certainty, that after a mode of taxation is adopted, the course of things will vary the value of estate, and the price of service, in the professions that are assiduous, so as very nearly to proportion the taxes equally among the people. Upon this principle then it is advisable to establish a mode of taxation as general as possible and on such articles about which there can be the least deception, and leave it to the operation of things to produce an equality. Frequent changes of the mode will only retard this operation.

But it is hoped that the state will so manage their finances as not to have occasion, to resort to direct taxation, as a system of revenue. It is wonderful to observe, with how much greater facility money can be drawn from the people, by indirect, than by direct taxation. The immense sums paid in Great-Britain, if collected by a direct tax, would very soon bankrupt the nation.

The sum paid by the State of Connecticut to the United States, exceeds probably half a million of dollars annually. This would be a tax not far from two shillings on the pound. It would not be practicable to collect this sum by the direct mode, by which the revenue of the state is collected; but by the indirect mode adopted by congress, the money is collected, and the people feel from it no burden or oppression, and are not deprived of a single enjoyment. The tax works itself into the price of the articles consumed, and from time to time it is gradually and imperceptibly paid in small sums, without any inconvenience to the consumer.

7. Collectors of town taxes. Towns have a right to appoint collectors to collect such taxes as they grant, to defray the necessary expenses of the town. A proper rate bill must be made containing the sums due from each person, and an assistant, or justice of the peace, can grant a warrant to collect them. The collector has the same power in the collection of the rates, as the sheriff has in the collection of an execution. When they neglect their duty, and fail to make payment, the selectmen on application to an assistant or justice of the peace, may obtain a warrant against them, for the sum in arrear, which may be collected out of their own estates.

8. Grandjurors are officers appointed to make information of all crimes, that are committed, and for neglect of presenting any breach of law, of which they have knowledge, shall pay a fine to the town treasury. If any town neglect to make choice of grandjurors, they incur a penalty of five pounds to the county treasury.

9. Sealers of weights and measures, are to seal all the weights and measures that are used in the town, and no person shall use any weights and measures, that are not proved by the standard, under a penalty of five shillings, payable to the town treasury.

In addition to these officers, there are leather-sealers, tything-men, haywards, chimney viewers, gaugers, packers, and key-keepers, whose duty is of a nature, that it cannot be expected to be detailed in a general treatise.

All

All persons duly elected to any town office, that refuse to serve or take the oath (if any be required,) if able to execute the office, shall pay a fine of twenty-six shillings to the town treasurer. If any officer neglects the performance of the trust committed to him, he shall pay a fine of fifteen shillings. If by refusal, death, or removal, there be a vacancy of any town offices, the town may convene, and fill the vacancy.

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CHAPTER SEVENTH.

OF SOCIETIES AND THEIR OFFICERS.

**I**N handling this subject, I propose to consider the ecclesiastical constitution of this state.

A remarkable difference is observable between ancient and modern times, respecting religion. <sup>b</sup> The pagan nations universally adopted polytheism, which admitting the idea of national gods, excluded the principles of intolerance, and the cruelties of persecution. <sup>c</sup> The Grecians and the Romans, vested the power of presiding in religious ceremonies, in the civil magistrate, and the same person inspected the entrails of the victims, and guided the councils of the nation. There was no distinction of clergy and laity. There were no priests to possess exclusive rights and temporal power, by which a particular order in the state, could be aggrandized, but the union of both powers in the magistrate, rendered religion subservient to the peace of government and the welfare of the people. The tolerant polytheist, beheld however, with indignation, the unsocial worship of the descendants of Abraham, who made it their glory, that they were the peculiar favourites and chosen race of a God, who was infinitely, superior to the gods of their neighbours. <sup>d</sup> But when the disciples of Jesus, emerged from the land of Judea, pronounced the gods of the conquerors of the world, to be false gods, and condemned their rights and ceremonies which had grown venerable by time, the tolerant hand of polytheism, was provoked to punish them; not for the errors of their religion, but for their obstinate contempt of the religion of the empire. Had they acknowledged the deities of their sovereign,

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<sup>b</sup> Gillies Hist. Greece, vol. i. chap. i. <sup>c</sup> Ferguson's Hist. Rome, vol. i. chap. i. <sup>d</sup> Gibbon's Hist. Rom. Empire. <sup>e</sup> Hume's Hist. Nat. Relig.

and claimed for their favour, the common privilege of a national god, without doubt, Jesus would have been permitted to have taken a seat in the heavenly council on Olympus, in company with Jupiter and Juno, Mars and Venus. *c* But to dethrone the father of gods, and king of men, with the *f* thirty thousand subordinate deities, that presided over every department of nature, and on their ruins to elevate a crucified God, was deemed an act of impiety, that called for the highest indignation and justified the severest punishment.

When the superior beauty and excellence of christianity, dissolved the baseless fabric of pagan superstition, and brightened with new born lustre, the imperial purple of Constantine, it was thought necessary and proper, that the ho'y rights and ordinances, should be administered by hands set apart, and consecrated to that pious office. Hence arose a new order of men, and the ecclesiastical hierarchy was established.

Sundry causes co-operated to give the christian clergy, a power unknown to the pagan priesthood. The removal of the seat of empire from Rome, gave the bishop of that city, which having so long been the capital and mistress of the world, had acquired the respect and veneration of all nations, an opportunity to obtain an ascendancy and influence over the other churches, without the presence of a sovereign, to check the progress of their designs, or eclipse the pomp and splendor of ecclesiastical dignity. Had Rome been honored by the imperial residence, it is beyond a doubt, that the Roman pontiff had never acquired a greater share of temporal authority, than the patriarch of Constantinople.

*g* The northern nations who conquered and settled the provinces of the western empire, had been accustomed to yield the blindest submission, and most servile obedience to their priests. The druids, who performed the most solemn rites, and awful ceremonies in the deep recesses of the wide extended forests of Germany, were

*c* When Jove convened the senate of the skies,  
Where high Olympus cloudy tops arise,  
The *Sie* of Gods.— Hom. *Iliad*. viii. 3.

Panditur interea domus omnipotentis olympi,  
Concilium que vocat, divum pater, atque hominum rex,  
Sideream in sedem. Virg. *Æneis* l. x. 1.

*f* Hesiod *op. et Dies*. l. i. 240.

*g* Cæsar de bell. Gallico. l. v. c. 13. Tacitus de mor. German. c. vii.  
Meibem's *Ecl. Hist.* Vol. II. 59.

were held by those heroic warriors, in higher estimation than their leaders, and governed them in peace and war with absolute sway. On their conversion to christianity, they conferred on the christian priesthood, the authority of the druids, and the bishop of Rome became the arch-druid of the christian world. To the simplicity of this religion, they annexed the magnificent rites of paganism, and a pure religion that was calculated for the poor, the meek, and the humble, whose precepts were to despise the world; to mortify the desires of the flesh, and the pride of the heart, underwent a transformation, by which the priesthood gained those perishing riches, and indulged in those sensual pleasures, which they affected to condemn, and the successors of a fisherman were invested with the highest dignity, and assumed the greatest pomp and splendor that ever were bestowed on worms of the dust. The popes, on the maxim, that all things were lawful for the saints, in pursuing the glory of God, took advantage of the weakness, the folly, and the ignorance of mankind, and practised pious frauds, and holy forgeries, to establish that supreme power, which they so ardently desired, and against which they pretended to have the authority of scripture, that *the gates of hell should never prevail*. The pretended gift of Constantine, of the city of Rome, and the actual donation of extensive territory by Pepin and Charlemagne, gave them a temporal power by which they greatly augmented their spiritual influence. They obtained an absolute authority over the opinions of mankind, and exercised over them, a more extensive and despotic rule, than ever was established by the arms of a conqueror.—Seated at the head of the church militant, and vested with the high privilege of infallibility in matters of religion, they fulminated their bulls, against all who opposed their supremacy. The potent sound of their voice, hurled emperors and kings from their thrones, and absolved their subjects from the oath of allegiance. They gave away the kingdoms of those princes who continued refractory, and trod on the necks of those who humbled themselves before them. The greatest potentates, deemed themselves honored to kiss the toe of the successor of saint Peter, and the vicegerent of God.

As ecclesiastical despotism, was founded on mere opinion, a uniformity

formity of religion became necessary to support it, and the popes exerted all their power to accomplish their favourite plan. As the clergy had such an irresistible controul over the minds of the people, it became necessary for kings, to admit such political establishments of religion, as they dictated, and to become the instruments of supporting and extending their influence, for the purpose of obtaining it to strengthen the arm of the civil magistrate. In this manner were introduced those two leading doctrines, in the politics of the dark ages,—the necessity of civil establishments of religion, and of uniformity of opinion in articles of faith, to maintain the authority of the church, and the power of government. The clergy usurped an uncontrolled authority in all matters, which they pretended, were of an ecclesiastical nature. They separated themselves from the civil state, they became a distinct order of men, devoted to the sole employment of religion, and forever ready to interrupt the tranquility, or impede the administration of government, when they thought it necessary to guard, or extend the rights of the church. Hence originated a government within a government, and a separation of interest between the clergy and laity, which produced perpetual discord and contention. The right of establishing uniformity in religious opinions, justified the majority, who assumed the stile of arthodox, in punishing the minority, whom they branded with the infamous name of heretics. This gave birth to the abominable practice of persecution, which these unfeeling tyrants reduced to system. The inquisition was instituted for the discovery and trial of heretics. The wretched victims of spiritual jealousy, were stretched on the rack, to be tortured into a confession of crimes, of which they were innocent. When convicted by a mode of trial, which gave guilt and innocence equal chances to be acquitted, their excruciating agony, and intolerable distress, amid consuming flames, furnished a delightful spectacle to their cruel persecutors, who impiously pretended, that the God of mercy, and the father of mankind, would smell a sweet savour from such bloody and inhuman sacrifices.

When

In 1680 Charles II king of Spain, honoured by his royal presence, an auto de fe, the burning of an heretic, condemned by the inquisition.—So late as 1780, the holy inquisition, condemned to death, a woman for witchcraft and sorcery, and she was burned pursuant to the sentence.

Bourgoanne's Travels in Spain, vol. i. 160. 173.

When the professors of the pure religion of the humble Jesus, had commenced a traffic in the sins and wickedness of mankind, and the corruption of the church of Rome, had become so enormous, as to call aloud for reformation, the bold hand of Luther, and the reformers, rent asunder the veil that had concealed the mysteries of papal iniquity for ages, and exposed to view the impurities and absurdities of the Romish religion. Yet the reformers never discovered the genuine principles of religious liberty. They did not deny the existence of a right, in the true disciples of Christ, to punish with temporal pains, and penalties those persons whom they deemed to be heretics. They censured the church of Rome, not because they persecuted, but because they persecuted the faithful servants of God. In every instance where they had power, they persecuted those whom they considered to be heretics. The barbarous persecution and cruel death of the learned and virtuous Servetus, which was procured by Calvin, in violation of every principle of justice and humanity, has stained with indelible infamy the character of that celebrated reformer.

When the English nation threw off the papal yoke, they vested in their sovereign, the power of supreme head of the church. They retained the doctrine of the necessity of religious uniformity, and ecclesiastical establishments, for the preservation of church and state. The act of uniformity that was passed in the commencement of the reign of the celebrated queen Elizabeth, established the rites and ceremonies of the church of England, and inflicted severe punishments on all dissenters. Thus the right of persecution was asserted, and the power enforced by an act of parliament, and during the reign of this queen and her successor, the unfortunate puritans experienced its dreadful consequences. They were punished for non-conformity to the established church, which they deemed idolatrous and heretical. They were prohibited from assembling for the purpose of conducting public worship, according to the dictates of their own consciences. Whole families were ruined by fines and imprisonments, and many learned, pious, and exemplary preachers suffered the punishment of death by the hand of the common executioner. The indefatigable zeal with which the clergy executed those barbarous laws, rendered the situation of the dissenters



senters wretched and deplorable, and led them to seek a country, where they could enjoy liberty of conscience, uninterrupted by the haughty domination of a priesthood, and the unrelenting fury of persecution. The wilds of America opened to them the prospect of an happy asylum, for the fruition of this inestimable blessing. Animated with this sentiment, some of the independents, a sect of dissenting christians, abandoned their native country, and embarked in an enterprise replete with danger, hazard, and uncertainty. Persecution in this manner originated and accelerated the settlement of North-America, the only good effect it ever produced.

Escaped from the severity and rigor of the ecclesiastical establishment in England, when they came to form their system for the government of church and state, the ministers and the people viewed each other with a jealous eye. They exercised the greatest caution, to avoid every thing that should expose them to suffer a repetition of those intolerable misfortunes, which had just banished them from their native land. The people were extremely careful not to trust in the hands of their ministers any temporal power, that could be exerted to the prejudice of their privileges, as citizens. The clergy having in their native country experienced the oppression of the civil arm, were equally cautious to guard against a power by which their immunities could be infringed. This mutual jealousy had the beneficial effect, to induce them to adopt a more mild and tolerant establishment, than that with which they had been acquainted. But even at this time, their misfortunes and their sufferings had not taught them the genuine principles of religious liberty. They still adopted the political error, that religion could not exist without uniformity of sentiment, and government without an ecclesiastical establishment. They therefore recognized the right of the true church to punish heretics, and enacted laws for that purpose. But the punishments grew mild in proportion to the progress of humane and benevolent sentiments. The happy æra had not yet arrived, when these destructive principles should be exploded, and these barbarous institutions abolished.

\* In the first settlement of Connecticut, the legislature adopted an ecclesiastical constitution of the following form. No persons could  
embody

\* Ancient Statutes of Connecticut revised in 1672 and published at Cambridge in 1673. 21.

embody themselves into a church, without the consent of the general court, and the approbation of neighbouring churches. No ministry, or church administration could be attended upon, by any of the inhabitants, distinct from, and in opposition to that which was dispensed by the approved minister of the place, without the approbation of the general court, and neighbouring churches, on penalty of five pounds. They expressed their apprehension of danger, from the divisions respecting church-government, yet from tenderness to the consciences of those, who differed in sentiment, they declared, that as the congregational churches in profession and practice, had been approved of, they would countenance the same, and protect them from disturbance till better light should appear; yet as there were sundry persons of prudence and piety of different sentiment, whom they wished to accommodate, they ordered that all such persons, being approved of according to law, as orthodox, and sound in the fundamentals of the christian religion, should have allowance in their persuasion, and profession, in church ways or assemblies, without disturbance. They enacted laws to punish persons guilty of reviling the preached word, interrupting or disturbing the preacher, or absenting themselves from public worship. For the purpose of maintaining the peace, and prosperity of the churches, as well as the rights and liberties of the people, they declared that the civil state had power and authority to see that the peace ordinances and rules of Christ, be observed in every church, according to his word, and to deal with any church member, in a way of civil justice, and not in an ecclesiastical way, and that no church censure should degrade, or depose any man from any civil dignity, office, or authority. They ordered the societies to make provision for the support of the ministers, and on failure, enabled the county courts to make provision. They were so fully convinced of the truth of their own creed, and of the right of punishing heresy, that they / enacted that all persons who should unnecessarily entertain any quaker, ranter or Adamite, or other notorious heretic, should forfeit five pounds, and the like penalty per week was inflicted on towns, that should suffer such entertainment; that no person should unnecessarily fall into discourse with them, on penalty of twenty shillings. The governor, deputy governor, or assistants,

were impowered to commit them to prison, or send them out of the colony. The masters of vessels who imported them, were obliged to export them on penalty of twenty pounds. Such were the outlines of their ecclesiastical establishment. No rules of church discipline, or articles of faith were established : but the clergy were left to their own discretion. No test acts were passed, which excluded any denomination whatever, from holding offices in government.

In the year 1706, the law against heretics, as far as it respected quakers, was repealed. In 1708, a law was passed, declaring that all persons who soberly dissented from the worship and ministry by law established, might at the county court in the county where they belonged, qualify themselves according to an act of parliament, passed in the first year of the reign of William and Mary, and enjoy the same liberty of conscience as dissenters enjoyed in England. The act of William and Mary, exempted protestant dissenters from the penalties incurred by non-conformity, upon their taking the oath of allegiance, and supremacy, subscribing the declaration against popery, and repairing to some congregation registered in the bishop's court, or at the sessions. This act furnished a very imperfect toleration. It only exempted them from punishment for non-conformity, but left them obliged to pay tithes, which is a most intolerable burden on the whole community, without acquiring equal privileges, with the rest of their fellow-citizens. But even this partial privilege was obtained with great difficulty. At the revolution, the despotism of James II. the eloquence of Locke, and the liberality of William III. convinced the parliament of the propriety of relaxing from the rigor of the act of uniformity, and of excusing from punishment their christian brethren, who were guilty of no other crime, but a difference of sentiment in the immaterial points of religion. This produced the before-mentioned statute, which is called the act of toleration. It was very natural, that the assembly of Connecticut, should imitate the practice and adopt the improvements of the mother country, and this undoubtedly gave birth to the statute of toleration passed in 1708, in favor of the dissenters in this country. They were however, still subjected to pay to the maintenance of the standing ministry. This statute answered

answered another excellent purpose, for it virtually tho not expressly repealed the law against heretics, which might then have been considered a great improvement in civil policy. Strange that mankind should generally derive greater benefit, from repealing laws, than enacting them : but in modern times, it is certainly a truth, that the happiness of the people has been more augmented by the repealing of laws that contravened the public good, than by any new regulations that have been devised.

In the year 1708, the general assembly expressed their approbation of the confession of faith, heads of agreement, and regulation of the administration of church discipline, agreed upon by the ecclesiastical synod held at Say-Brook, and ordained that all the churches thus united in doctrine, worship and discipline, should be owned and acknowledged to be established by law ; with a provision that nothing should be construed to prevent a society or a church soberly dissenting from the established churches, and allowed by law, from exercising worship, and discipline, in their own way, according to their consciences. This law, is the foundation of all the ecclesiastical constitution that has existed in this state. A sect of christians, conforming to the creed and church government, adopted by the synod of Say-Brook, was established. At this time, all the people whether they dissented or not, were bound by law to contribute towards the support of this ministry : but those, who conformed to the statute of toleration, were in every other respect independent of them.

But the government notwithstanding their tolerant principles, would not suffer any religious assemblies, unless conformable to the establishment or the statute of toleration. In the year 1723, they complain, that some persons without qualifying themselves according to law, for the enjoyment of liberty of conscience, presumed to form separate meetings, and that some administered the sacraments without ordination, they therefore passed a law, that all persons who neglected public worship in some lawful congregation, and presumed to meet in separate companies in private houses, should be punished with a fine of twenty shillings, and that every person not being a lawful or ordained minister, who administered the sacraments, should incur a penalty of twenty pounds. This law was

well calculated to excite tumult and promote dissention, but was necessary to preserve the establishment. When a government once makes an encroachment upon the natural rights of the people in one respect, they are obliged to do it in many others, for the purpose of securing the object in contemplation.

As soon as the principles of toleration were called into exercise other improvements were naturally suggested to the legislature. It soon was discovered to be contrary to the principles of religion, as well as justice, that a sect of christians who were tolerated and protected by law should contribute to the support of the ministry of another sect, whose difference of opinion prevented them from uniting together in public worship. In 1727, the professors of the church of England, made application to the assembly, stating that they were under obligations to support public worship according to the church of England, that dissenters had always esteemed it a hardship in England, to be compelled to contribute to the support of that church, praying that they might be exempted from such a hardship. This application was powerfully enforced by the consideration, that the applicants belonged to the church, which was established and protected by that government, to which Connecticut owed allegiance, and that there was danger, that force would be exerted to extort the privilege demanded, in case of refusal.— This accidental circumstance, produced this exemption, at a much earlier period, than it would have happened, if the same religious sect had governed in England and Connecticut. An act was passed, directing that the money collected of episcopalians, by taxes laid on the societies, should be paid to the episcopal ministers, in case there were any settled according to the canons of that church on whom such persons attended, and if the money so collected was insufficient, to support the minister, the episcopalians, might tax themselves for that purpose, and they were exempted from paying taxes to build meeting houses.

When fear and policy had introduced the exemption of the episcopal church, from contributing to the support of the established order, the precedent sanctioned the claims of every other denomination of dissenters. In 1729, the same privilege was granted to quakers, upon their attending the worship of God, in some society, allowed

allowed by the statute of toleration, either in the government, or on the borders thereof, if so situated that they could attend therein ; and producing a certificate that they had joined, and belonged to such society. In the same year the baptists on petition obtained the same privilege and exemption.

At this period the doctrine, that uniformity of religion was necessary to the existence of church or state was exploded, and one of the great sources of human calamity was dried up. At the same period was interwoven into the ecclesiastical constitution, the principle that the legislature had a right to interfere and discharge dissenters from any obligation to maintain the ministers of the standing church. The agreement of settling a minister, tho binding on the society, is merely a corporate or political transaction, and by no means involves a personal obligation upon the honor and consciences of men, like a private contract, because the majority governs, and a man may be legally subjected to a contract to which he never assented. The law was passed for the purpose of promoting the public good, and whenever an alteration became necessary for the same purpose, there must be an inherent right in the legislature, to make the alteration. It would be the highest absurdity to pretend that when the legislature had once adopted a regulation, they could not vary it according to the varying circumstances of the people. The settlement of ministers is merely a civil regulation, and in that point of view must be always under the power and controul of the legislature. This power has not only been possessed, but has in fact always been exercised by the legislature, and there is no contract of settlement, with any minister, but that was made at a time, when the parties concerned knew of the existence of such a power : In respect of the contracts now in being, the exemption of dissenters cannot be considered as an *ex post facto* law ; for prior to the existence of any contract, by which any minister now claims his salary, the law had given them the privilege of discharging themselves in their individual capacity. Every minister must have known at the time of his settlement, that the individuals of the society, have a power to avoid the contract, as it respects them personally, so that while they have a challenge upon the society, as a political body, the members are excused from paying in their private capacity. In this manner

manner every member, by lodging a certificate, may excuse himself from the support of the minister, and withdraw from the society; by which the society undergoes a total transformation, and a new one rises out of the ruins of the old, discharged from the contract to pay the salary of the minister. The original society as it respects schools, continues in existence; but as relative to the support of public worship, it is dissolved, and of course the contract by the operation of a law in being when it was entered into by the minister and people, is annulled, and at an end. The late acts of the legislature, respecting dissenters, cannot be said to be *ex post facto* laws, authorising a breach of contract, and destroying the faith of government. They are only the exercise of that power which the legislature has always exercised in altering and explaining the mode by which dissenters may attain that privilege, which had long before been granted to them, and to which they have been forever entitled by the laws of nature, and the principles of justice. It may therefore be laid down as a position founded in truth, that the power of exempting by an act of the legislature, a person that becomes a dissenter, from a corporate contract, has ever been a part of the ecclesiastical constitution, and that the right of individuals to this exemption, is derived from that eternal bill of rights that originated from the fitness of things, and existed prior to, and is independent of all human regulations.

But the most glorious improvement in the ecclesiastical constitution was reserved for the æra of the American revolution. In the revision of the laws in 1784, the establishment of the church discipline and government agreed upon by the synod of Say-Brook was omitted, and liberty of conscience granted to christians of every denomination. Tho perhaps the legislature had it not in contemplation, yet here is a compleat renunciation of the doctrine, that an ecclesiastical establishment is necessary to the support of civil government. No sect is invested with privileges superior to another. No creed is established, and no test act excludes any person from holding any offices in government. The leading principle of the constitution is founded on the acknowledged truth, that the sublime morality of the christian religion, is calculated to make men good citizens, and that the beneficial effects of it will be most apparent  
where

where it is least shackled with human laws. The regulations therefore grant to every person, the full liberty to adopt such creed as he pleases, and secure to every denomination, the power, and privilege of worshipping according to the dictates of their consciences. Thus we derive from the voluntary profession of religion, all the benefit of an ecclesiastical establishment, without the inconveniencies. Such is the history of the progress and gradual improvement of our ecclesiastical constitution. A concise view of the present state of it, will close this subject.

• The state is divided into certain districts, called societies, which have the power of assembling, of holding annual meetings, of appointing a clerk, treasurer and committee, of laying taxes, and appointing a collector to collect them. The major part of the inhabitants of a society have power to call and settle a minister, and make agreements with him respecting his salary, which shall be binding on the whole, and their successors. They are to lay taxes annually for the support of the gospel ministry, and can appoint collectors, and enforce the collection. If the allowance for the maintenance of a minister, be too scanty, on application, the general assembly may grant relief, and where the preaching of the gospel is neglected for a year or years, the general assembly may grant a tax, and when collected, the county court may dispose of it for the use of the ministry in the society. Such are the powers vested in the located societies. • To prevent them from tyrannizing over the consciences or the property of any of the people, the law has provided that every denomination of christians, who differ from the worship and ministry adopted by the major part of the inhabitants of the located societies, may form themselves into distinct churches or congregations for public worship, in such manner as they may judge proper, and that all persons who attend such churches or congregations may give under their hand, a certificate of their dissent, and lodge the same with the clerk of the located societies, and become wholly independent of them, and are to all intents and purposes, legal corporations—for the law provides, that all such churches and congregations which have or shall form themselves as aforesaid, and who shall maintain and attend public worship by themselves, shall have liberty and authority

• Statutes, 235. • Ibid. 416.



rity to exercise the same powers, for maintaining and supporting their respective ministers, and for building and repairing meeting houses for the public worship of God, as the other societies, and may in the same manner commence and hold their meeting, and transact their affairs.

This is levelling all distinctions and placing every denomination of christians equally under the protection of the law.† Indeed the people are left to their own freedom, in the choice of their creed, and mode of worship. The major part of the inhabitants of the located societies, possess the same privilege. Before the revision of the laws in 1784, while the church discipline adopted by the synod of Say-Brook, was in force, they were legally compellable to support the gospel, in that manner : and since that time, they have by common consent recognized the authority of that synod, and made their acts the basis of ecclesiastical government ; but as this has no legal force, they may adopt or refuse it as they please ; and may form any other rules of discipline, according to their own sentiments. In consequence of this a perpetual variation of religion may take place, without any interruption from civil regulations, and

† I have ventured to say that all denominations of christians are placed on a footing by law, because I consider they are so in effect, tho a little distinction is kept up, between the located and dissenting societies. The located societies have a right to tax all within their limits, who do not lodge certificates agreeable to law. The lodging of certificates by the dissenters, has been deemed by some a mark of degradation, but this idea may be removed when it is considered that it is not an act acknowledging any superiority in the located societies, it is nothing more than an act in the dissenter, to inform the located society, that he does not belong to them. It is only a legal mode of evidence to ascertain to what society the people belong. It is a part of the acts necessary to be done, to constitute a new society ; and when a number of persons, who dissent from the located society, have entered into a mutual agreement, established public worship, and lodged their certificates, they are during the continuance thereof, a complete, legal, corporation, and are precisely on the same basis with all other societies, without being amenable to them in any respect. As the located societies were first established, and are the most numerous, it was reasonable that dissenters who formed new societies, should lodge certificates with them.

Another difference is, that where a person attends on public worship in no religious society, he shall be taxed in the located societies. Such person ought to be taxed some where, and as dissenters, can have no claim upon persons, who do not join them, there is no injustice done them, by permitting persons who belong no where to be taxed where it will be most convenient : for it would be difficult for dissenters to adopt a mode to ascertain such persons, while the located societies, can do it with the utmost facility.

When I use the word dissenters, it is only for the sake of distinction, for I consider the inhabitants of the located societies, to be as much dissenters from other societies, as I do them from the located societies.

and christianity in every possible shape, is so far countenanced as to give the professors an undisturbed enjoyment of their own opinions. It is very possible, that the sect in the located societies, which have considered themselves established, may cease to be the major part, and become the minor, and be obliged to give certificates to them whom they now call dissenters. This opens the door for the progressive improvement of religion unshackled by human laws. Many of the absurd and irrational doctrines which have so long disfigured and disgraced christianity, are already exploded, and there is a prospect that many more will soon meet with the same fate. Mankind are rejecting those false appendages of religion, which have so long imposed upon them penances and restraints, that have only contributed to encrease their wretchedness and misery. They begin to entertain an idea, that religion was not instituted for the purpose of rendering them miserable, but happy, and that the innocent enjoyments of life, are not repugnant to the will of a benevolent God. They believe there is more merit in acting right, than in thinking right; and that the condition of men in a future state, will not be dependent on the speculative opinions, they may have adopted in the present.

It is a pleasing consideration, that pure religion and moral virtue, have augmented in proportion to the progress of liberality of sentiment, and that every relaxation of the severity of the ecclesiastical establishment, has contributed to the stability of government, and the happiness of the people. There are many who having in early youth, imbibed the false principle that government cannot exist without a civil establishment of religion, are now unwilling to rescind it: but a contemplation of this subject, must furnish the clearest demonstration. It will be found in all countries that ecclesiastical establishments have subjected mankind to a despotism that has largely contributed to their distress, and that human happiness has been proportioned to religious liberty. In this state, since the rejection of our ecclesiastical establishment, religion has become more flourishing, government more energetic, and the people more peaceable. These considerations must demonstrate the important truth, that a religious establishment is not necessary to the support of civil government, and that religion left to itself, will produce the happiest influence on civil society.

A question of importance has been frequently agitated with respect to the right of government, to interfere in the concerns of religion. I am clearly of opinion that no legislature has a right to prescribe the ceremonies, the creed or the discipline of a church : but that where the people in general acknowledge the truth of a particular religion, and the duty of public worship, the legislature may step in to their aid, and enact laws that are necessary to enable them to support public worship in a manner agreeable to their consciences. In this state, the people in general recognize the truth of the christian religion, and the duty of public worship. The legislature without establishing any religion, has considered christianity to be the religion of the people, and has enacted laws to authorise the people to maintain public worship, in the manner which they deem proper. No mode of worship is prescribed, no creed is established, no church discipline enforced. In point of principle there is no coercion. In point of support there is no compulsion, only in such manner as by their own acts, all have acknowledged to be right, and to which they have agreed to submit. A Jew, a Mohometan, or a Bramin, may practice all the rites and ceremonies of their religion, without interruption, or danger of incurring any punishment. A fair construction of the law will give to every person that religious liberty, which leaves no ground for complaint or dissatisfaction. Every christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship, he may stay at home and believe as he pleases, without any inconvenience, but the payment of his tax to support public worship in the located society where he lives.

The only ground of dispute between different denominations, is with regard to the construction of the statute, securing the rights of conscience. Heretofore, dissenters, as it was always in the power of the inhabitants of the located societies, to try the legality of their certificates of dissent, have been subjected to hard and rigorous usage. Courts and juries have usually been composed of what was considered the standing church, and they have frequently practised such quibbles and finessè with respect to the forms of certificates

ates, and the nature of dissenting congregations, as to defeat the benevolent intentions of the law. Such an illiberal prejudice is manifestly repugnant to the genuine spirit of christianity. Christians ought to attend to two considerations, which are of great importance as relative to the peace of society. In all instances where a dissenter claims to be exempted from paying taxes to the support of the ministry in the located societies, by virtue of the statute, and the question is brought to trial before a court of law, the triers should be extremely careful to strip themselves of all that prejudice which different sects are too apt to feel towards each other, they should judge upon the most enlarged principles of charity, and give the law the most candid and liberal construction. For nothing is more disgraceful, than for one sect to draw the support of its ministry from another. The very semblance of persecution should be avoided.

On the other hand, christians ought not to separate from each other on slight grounds. There can be no impropriety in their uniting together in the public worship and adoration of the common Father of all men, tho they should entertain a great diversity of religious sentiments. There can be no necessity, that all the members of the congregation should believe alike to render worship sincere. Each will believe and worship for himself, and their union in the act of devotion will be acceptable to God, tho there be as many different opinions as there are members of the congregation. For near eighteen centuries, the different sects of christians have been quarreling with each other, respecting a religion which recommends, brotherly love, as the most essential duty. It is time that they began to practice the religion they profess. They ought to know, that no one can have any occasion to quarrel about it, because every one has a right to think as he pleases. May we not hope, that the period is not far distant, when mankind will have sense enough to discern the extreme folly of a religious quarrel.

**O**UR law has established very plain, but effectual regulations for the keeping of schools. In every town, where there is but one ecclesiastical society, wherein are seventy families, or more, and in every ecclesiastical society (where there are more than one in a town,) containing seventy families or more, there shall be constantly kept and maintained, one good and sufficient school, for teaching and instructing youth to read and write, by a master well qualified for that purpose : and where the number of families is less than seventy, a school shall be kept half the year, and in every county town, there shall be constantly maintained a grammar school, kept by a suitable master, acquainted with the learned languages.

But such is the extent of towns and societies, that these regulations could have produced but little effect in the general diffusion of learning. In consequence of this, another regulation was adopted, which is calculated to furnish the means of education, to all the children in the state. Every town which contains only one society, and every society where there are more than one in a town, have the power in legal meeting, to divide themselves into proper and necessary districts, for keeping their schools, and to alter and regulate the same from time to time, as they shall have occasion : in virtue of this law, every town and society, have been divided into districts of such convenient and suitable extent, that all the children within the same, can daily attend on schools. The law also provides that every such town and society, at their annual meetings, may appoint committees, whose special duty shall be to see that schools are kept ; and the practice has been every year, to appoint some person in every district, to be a committee, who is responsible that a school shall be kept in the district, and who has power to procure a master for that purpose. He usually assembles the members of the district, to take their voice and direction in the contract with the school-master, and any other provision that is necessary to be made, for the support of the school. In all these districts, schools are commonly kept, from three to six months in a year, but in all the principal towns, schools are constantly kept.

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As districts are considered to be the principal organ through which schools are established and kept, additional power has lately been conferred upon them by statute, by which they are better qualified to answer the design of their institution. The members of the several school districts qualified to vote in society meetings, have power and authority to levy a tax upon the polls and rateable estate of the inhabitants, to build and repair school houses in such districts; and to appoint collectors, who shall have the same power to collect such taxes, as society collectors, and to chuse clerks in such district, who shall be sworn to make true entries, and give true copies of all their votes and proceedings. For this purpose the school committee within each district or such person as he shall appoint, shall duly warn the inhabitants in the district, who are liable by law to pay rates, and who are qualified as aforesaid to vote, to meet at some convenient place in the district, at least three days inclusive, before any tax should be laid. Two thirds of the members qualified as aforesaid, and present, must concur in a vote, laying a tax, and fixing the place where a school house shall be erected.

But it would have been vain, to have passed laws requiring schools to be kept, if means had not been provided to defray the expense. For this purpose, the legislature have adopted the cheapest and most effectual expedient. The treasurer of the state is directed, annually to deliver and pay the sum of forty shillings lawful money, for every thousand pounds in the lists of each town, and proportionably for lesser sums, out of the taxes annually collected from each town for the support of civil government, to the school committees in the respective towns and societies, and for want of such committees, to the selectmen of each town: which money so received, is to be distributed among all the societies, for the benefit of schools in proportion to their lists, and from them such money is to be distributed among all the school districts in proportion to their lists, upon this condition, that the society committee or selectmen must deliver certificates, that schools have been kept, the preceeding year, in the towns or societies, for whose use they apply for the money according to law. In this way, the money

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is collected with the public tax, but is payable only on condition, that the law is complied with.

The legislature also have disposed of the avails arising from the sale of lands in the state, and from excise, to certain towns and societies to be kept as a permanent fund, and the annual interest thereof to apply to the use of schools in such towns or societies, and to be divided among the districts in proportion to their list, and to be forfeited on misapplication, to the state treasury. In many places, private donations and grants have been made for the same purpose. In case the foregoing provision shall be insufficient, then one half the expense is to be paid by the inhabitants of the town or society, and the other half by the parents and masters of the children that go to school : unless such town or society otherwise agree, which they have power to do ; and the law gives them full power to grant and levy taxes for the support of schools and to appoint collectors, to collect the same : and whatever they shall agree upon for the support and encouragement of schools, shall be binding on the whole. In consequence of this law, the general practice is, in each town consisting of one society, and in each society, where there is more than one in a town, to lay an annual tax for the support of schools, to a certain amount on the polls and rateable estate, and appoint the school committee in each district the collectors, by which method, a sufficient sum may be at all times raised to support schools : and the persons who are to take the immediate benefit of it, have the power to grant the taxes.

The selectmen of the town where there is but one society, and the committee of each society, where there are more than one in a town, have the charge of all school funds, whether consisting of money, or lands, and have power to let out money at interest, and lease lands and do all necessary acts for the preservation and management of such funds : excepting where the grantors, or general assembly in certain cases have committed the care of such estate, to particular persons, with direction for a continual succession.

The civil authority and selectmen in each town, are appointed  
visitors

visitors of schools, with power to visit and inspect the state of schools in their towns, from time to time, and particularly once each quarter of a year, and to enquire concerning the time they are kept, the qualifications of the master, and the proficiency of the scholars, and to give all necessary directions to render them most useful for the encrease of knowledge, religion, and good manners. If they discover such disorders, or misapplication of public monies allowed for the support of schools, as will probably defeat the good end proposed, they are to lay the same before the assembly, that proper orders therein may be given.

Since writing the foregoing, the legislature in May 1795, passed an act, appropriating the interest arising on the principal sum that should be obtained by the sale of the lands belonging to this state, west of Pennsylvania, to the use and support of schools, with the privilege to every ecclesiastical society, with the concurrence of two thirds of the inhabitants, to petition to the legislature, for the application of their proportion, to the support of the gospel ministry; which the legislature have reserved to themselves the power to grant during pleasure. No country can boast of a more liberal and noble establishment for the support of schools of instruction, and millions yet unborn, will bless the extensive and patriotic views of the authors of this goodly work.

In the course of these enquiries, we have treated of towns, societies and schools. The peculiarity and importance of these institutions, require a more minute discussion:

Towns in their present form, are a corporation which originated in the state of Massachusetts, and are coeval with the settlement of the country. Tho it be unquestionably a fact, that our ancestors borrowed the name of towns from the country that gave them birth, yet so different are the powers and privileges that are vested in such corporations here from what they had in England, and so little is the resemblance between the institutions, that our towns ought to be considered as an original discovery in civil policy. At the first settlement of an uncultivated country, it was natural to lay it out in small towns, for the purpose of accommodating the adventurers who commenced the settlement in small parties. When

TOWNS



towns were thus instituted, it was natural to vest them with all the powers necessary to manage their internal concerns, and for their mutual protection and defence. It is beyond a doubt that the peculiar situation of the first settlers of this country, led to the discovery and establishment of towns. The same principles induced the first settlers in this state, to adopt the same institution. They therefore divided the country into towns of suitable extent, to accommodate the meeting of the inhabitants for civil purposes. However unimportant this practice may appear to the careless observer, yet an attentive examination of it will convince every body, that it is the introduction of a principle, which, if carried to its full extent, may produce the most beneficial effects in a republican government.

Towns are probably the most genuine democratic corporations, that are to be found in any country. The people have a right to assemble personally; they have when assembled, the power to appoint certain officers, and to pass certain laws for their internal regulation. The power delegated to towns is restricted to such narrow limits, that they cannot encroach upon the government. They are only authorized, and enabled to do certain acts, respecting their own immediate and local concerns, which could not conveniently be done by the state legislature. Here then by the instrumentality of towns, the influence of government may be extended to the minutest interest of mankind, the most perfect order and regularity be established in every part of the community, and the whole strength of the people be called into action, with the greatest facility. These popular privileges have a powerful effect upon the personal character. Every inhabitant of a town, in virtue of his corporate rights, feels that he is of considerable consequence among his fellow citizens. He does not feel himself degraded to the low rank of a slave, who has nothing to do, but to obey; but from the share, which he has in the government, he is conscious of the dignity of a freeman, and has a personal pride and interest, in the support of a government in which he is entitled to so much consideration and respect. The share which he has in the administration of the affairs of a town, teaches him the duty, and the necessity of obedience to law,

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and subordination in civil society. The observation of the necessity of order and regularity, to preserve the tranquillity of a town, convinces him of their necessity in government. Such ideas grow familiar and habitual. He becomes accustomed to think, reflect, and judge upon such useful topics with candour and correctness. The course of his practice and the train of his sentiments, lead him to be a quiet citizen and a good man, and prepare and qualify him to act an able part, in the higher offices of government. The frequent meetings of the inhabitants of towns for such important purposes, give them opportunities of cultivating an acquaintance with each other, and have a powerful tendency to improve their sentiments, and civilize their manners. They contract a mutual friendship, and become united like a band of brothers. Their personal respect, and esteem, will prevent those quarrels and contentions, which too often mark the meeting of strangers, or people that collect from large districts.

But the singular advantages of this institution are displayed in the most conspicuous manner, in the election of public officers. The moderate size of the towns, renders the assembling of the freemen convenient, and the smallness of their number, permits a personal acquaintance with each other. This prevents them from being the dupes of party and faction. In the choice of the representatives of the state legislature, they are too well acquainted with the personal character of every freeman to be deceived, and imposed upon. In the choice of officers, who are elected by the whole state, the great number of towns, prevents the practicability of extending the arts of intrigue effectually through the state. An artful man, may influence a few towns, but it rarely happens that the whole state is operated upon by such influence. We never hear of quarrels, tumults, and riots, at elections: they are generally conducted with good order and propriety. But where people assemble from a large district, the remote parts must be strangers to each other, will be actuated by different interest, and will have their local friends to support. This naturally leads to disorder and violence, and the scene will be greatly heightened by the numerous concourse of electors. Hence in some countries, the several candidates, by every art of intrigue, and bribery at-

tempt to obtain votes. Having canvassed the district, to make known their wishes, having solicited the assilance and patronage of their friends, and having induced the electors to attend, by a liberal distribution of the juice of the grape, they place themselves at the head of their parties, and continue the practice of their intrigues. These parties armed with clubs frequently meet, dreadful affrays, and riots ensue, well fought battles take place, and the combatants part with broken heads and bloody noses. It is a serious consideration, that in any part of the union, such practices should be tolerated. The people who are unaccustomed to such violence, will hardly think that their liberties are safe, in the hands of a man who puts himself at the head of an armed mob, to gain an election. Some gentlemen who lament the practice, declare, that in many places, they cannot obtain an election, without soliciting and treating the freemen for their votes. A practice so dishonorable to human nature, and so dangerous to civil government, ought to be abolished. I know of no mode more effectual to accomplish it, than to direct the freemen to meet in small bodies, from small districts. In the state of Connecticut, the sentiments of the people would not permit such arts of intrigue to be practised, and the most popular demagogue would not be able to excite a riot.

The division of a state into a large number of towns, breaks the spirit of sedition, and weakens the principles of anarchy. The flame of discontent cannot circulate with so much rapidity, and the schemes of faction will be constantly interrupted in their progress. When the people assemble only in small bodies, and the boundaries of a town will limit the place from which they collect, they will generally be cool, and deliberate, and will not be impressible by the strong impulse of democratic violence, and rashness. If there be an attempt to draw the people generally into any scheme, there will be no mode, but to elect a number from each town, to meet for that purpose. The moment this mode is adopted, the prospect of much mischief vanishes. The persons thus elected are placed in a peculiar state of responsibility, and when they meet, their number will be so small, that they will be more disposed to proceed with deliberation, than to rush headlong into measures, with the violence of a mob.

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But when the people are allowed to assemble in large bodies danger is to be apprehended. Their violence, and inconsideration, seem to be proportioned to their numbers. They neither reflect, or deliberate. They are governed by the impulse of the moment. Fired by the slightest rumour they are too impetuous to search for the truth. They are ripe for the most hazardous, and rash measures. An artful, and designing man can direct their motions at pleasure. They yield the blindest submission to the will of their leader. The flame of sedition flies like the electric fluid instantaneously from man to man, their impetuosity increases every moment, there is no enterprize too daring, no scheme too horrid for them to attempt. They neither hearken to council, nor yield to opposition, they bear down all before them with irresistible fury. The populace of a large city, when convened in a mob, are the most dreadful monster, that ever was let loose upon civil society. Ignorant, profligate, and headstrong, they regard no consequences, they rush where passion prompts, and death and desolation mark their progress. Experience evinces the truth of these remarks, and demonstrates the impropriety of a civil institution, that requires the people to assemble in large bodies. It demonstrates also, the inconvenience of large cities, which will too often be the nurseries of vice, dissipation, and sedition. It is a happy circumstance, that the locality of Connecticut will not admit the growth of any very large town; but that the channels of commerce, are distributed to so many towns, as to prevent the accumulation of great wealth and population, at any one place. A very large city is attended with many inconveniences to society. It concentrates too much power in one place. It destroys the proper equilibrium, and endangers the existence of the government, and the tranquillity of the community. Where a town is likely to grow too large, a rival town ought to be encouraged in such a manner as to direct the channels of business through every part of the country, and establish a number of towns of equal magnitude, that may counterbalance and counteract each other. These observations are fully justified by the conduct of all large cities.

Ecclesiastical societies are a corporation co-eval with our government, and calculated for the purposes of religious worship,  
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and moral instruction. The right of the people to assemble and deliberate in their meetings, furnishes an opportunity for improvement similar to towns : but the great advantage derived from these corporations is, that they lay a foundation for the general diffusion of useful information. In every society, a teacher is employed to instruct the people in the duties of religion and morality, on a day set apart for that purpose. These discourses are not only calculated to prepare a man for a future world, but in doing this they instruct him in the duties he owes to mankind. They teach him to restrain his vicious propensities, by the most powerful considerations. They impress upon his mind the principles, and form the habits of virtue. They lead him to think and reflect, upon the most important duties of life. They accustom the mind to useful researches, and serious contemplation, and point out the necessity of regularity in society, and subordination in government.

The frequent meeting of friends, and neighbours, for religious worship, cultivates and enlivens all the social feelings ; it softens, harmonizes, and improves the human heart ; it extends the principles of benevolence, and brotherly love. It smoothes the asperities of temper, and polishes the roughness of disposition. It refines the manners, and liberalizes the sentiments. Man by such intercourse, ceases to be austere, ferocious, and savage, and the propensity to contend and quarrel is lost in the feelings of humanity. The solemnity and regularity of religious worship, give to their manners a certain elevation, decency, and dignity, and learn them to treat each other with respect, attention and propriety. The relish for society, is heightened and the manners improved, without corrupting their morals, or debasing their sentiments. To make a respectable appearance in such an assembly, it is necessary that they pay a proper regard to dress, and this inspires them with a taste for neatness, elegance, and cleanliness. In fine, religious assemblies may be made a noble source of useful improvement, and rational entertainment.

Schools are an establishment, that is calculated to lay the foundation for that early instruction, which is necessary to make men good citizens. Education is a copious and interesting theme,  
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and has long occupied the attention of legislatures and philosophers. The Persians the Cretans, and the Spartans, attempted to establish a national education. Their views were not directed to the communication of science. Their object was the practice of bodily exercises, and the impression of certain sentiments correspondent to the nature of their institutions. The Spartan system which has been the most celebrated, was intended to inspire with sentiments of heroism, and patriotism, the freemen who were supported by the industry and labour of slaves, and did not regard the happiness of every part of the community.

Quintilian, Milton, Locke, and Rousseau, employed their sublime talents, in sketching plans for the education of youth: but these were calculated for those who had wealth and leisure, to devote their whole time to the pursuit. They did not contemplate the idea of general education. This honour has been reserved for the state of Connecticut, and some of the other states in New-England. In no other country, have the legislature established, and provided for a system of education, that is calculated to diffuse to all classes of the people, that general information which they are capable of acquiring, without interfering with that portion of labour which is necessary to obtain a subsistence.

No man can acquire very extensive knowledge by his personal experience and observation. Science has been the result of the experience and observation of many different persons, in different ages and countries. By committing their ideas to writing, they have been able to collect, arrange, and mature them, and transmit them to successive ages. Our ideas must be confined to a very narrow circle, unless we can unlock the treasures of learning, and be benefited by written communication of information, from every part of the world. These considerations clearly point to that kind of science which is most useful and necessary. On this subject, our ancestors at a very early period of the government, formed a just opinion.

Before the year 1672, they passed an act, which as it is expressive of their peculiar sentiments and stile, is worth transcribing.

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“ It being one chief project of satan, to keep men from the knowledge of the scriptures, as in former times, keeping them in an unknown tongue, so in these latter times, by persuading them from the use of tongues, so that, at least the true sense and meaning of the original, might be clouded by the false glosses of saint-seeming deceivers ; and that learning might not be buried in the graves of our fore-fathers, in church and colony, the Lord afflicting our endeavours. It is therefore ordered by this court, and the authority thereof, that every township within this jurisdiction, after the Lord hath encreased them to the number of fifty householders, shall then, forthwith appoint, one within the town, to teach all such children, as shall resort to him, to write and read : whose wages shall be paid either by the parents, or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those who order the prudentials of the town, shall appoint : provided that those who send their children, be not oppressed by paying much more, than they can have them taught for in other towns : and it is further ordered, that in every county town, there shall be set up and kept a grammar school, for the use of the county, the master thereof being able to instruct youths, so far as they may be fitted for college.”

They soon after passed a law, that in every town where there were seventy householders or more, they should constantly have a school master able to teach children, to read and write : if less, then for half the year. And that there should be a grammar school in every county town. For the maintenance of school masters, they provided, that every town should annually pay forty shillings, for every thousand pounds in their lists, and if that sum should not be sufficient, the residue to be provided, one half by the town, and one half by the parents and masters of the children.

In the year 1717, an act passed, requiring that in every society, where there should be seventy families, a school should be kept eleven months in the year, and if less, then half the year : and the society should have power to levy and collect taxes for the support of schools.

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Such was the manner, in which our ancestors were led to establish, and provide for the support of schools. The delegation of power to societies, to levy taxes for that purpose, was a wise measure : but the provision for the payment of forty shillings, for every thousand pounds in the general list, to be collected with the public taxes, deserves the highest commendation. Tho this system of instruction may at first view appear to be of trifling consequence, yet an attention to its beneficial effects, will evidence it to be one of the wisest and noblest institutions that has ever been discovered and adopted, in any age or country. Did I know the name of the legislator, who first conceived, and suggested the idea, I should pay to his memory, the highest tribute of reverence and regard. I should feel for him, a much higher veneration and respect, than I do for Lycurgus, and Solon, the celebrated legislators of Sparta, and Athens. I should revere him as the greatest benefactor of the human race, because he has been the author of a provision, which, if it should be adopted in every country, would produce a happier and more important influence on the human character, than any other institution, which the wisdom of man has devised.

Tho the provision be small, yet it is placed upon a basis calculated to produce great consequences. The law requiring the keeping of schools in every society, might have been of difficult execution, had not a sum been provided for their support, payable only on the condition, that they are kept. This will be a sufficient inducement to parents to raise in some other way, a sufficient sum to support a school for such length of time, as will be advantageous to their children, in order to obtain the proportion, of the money which will be collected from them, in their public tax, and which they must lose, unless they procure schools to be kept. The law having exhibited a motive sufficient to introduce schools, their beneficial effects when experienced, will infallibly induce their continuation.

The importance of this institution, is manifested by the consideration, that it communicates to all classes, that degree of knowledge which they are capable of attaining. That mankind at large, should



should become scholars and philosophers, is manifestly impracticable. It is however, evident, that they are capable of acquiring a portion of science sufficient to convey them accurate ideas, respecting the duties of religion and virtue, to understand their own rights, and privileges, and to comprehend such topics for contemplation and conversation, as will give them a relish for the social pleasures. In the common schools, children at the time of life when they can be spared from labour, may have an opportunity to be instructed in reading, and writing, and those branches of the mathematics, which will qualify them for the ordinary business of life. If gentlemen wish to give their children liberal educations and make them men of science, or prepare them for the learned professions, they may send them to the colleges. This is a branch of education, with which no government could intermeddle with propriety ; but for the purpose of guarding against the inconveniences of ignorance, a government is bound to make provision for the general education of children.

How noble, how elevated does this system appear, when it is considered, as calculated to extend the blessings of knowledge, to all ranks of people, to teach them to assert their rights, to regard the laws, and to be happy in the social intercourse. When we read the systems of education, which are designed for the children of opulent persons only, how contemptible do they appear, when compared with a system that spreads information through the whole mass of the people, and communicates happiness, as far as it extends. How does the mind expand, how does the heart dilate, at the glorious prospect of such wide extended happiness and information. The more I contemplate the scene, the more I am delighted. I feel a pride to think that my country has been enriched by such a noble discovery. I feel an enthusiasm to communicate it to the world, for the purpose of extending happiness to the whole human race.

We are next to consider the actual influence of these institutions upon science, manners, society, and government.

Schools have communicated the rudiments of useful literature, to all the classes of the people. It is a rare instance, that there  
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is a person of sufficient age in the state, who cannot read and write, and who has not sufficient knowledge in arithmetic to keep ordinary accounts. It would be deemed a great disgrace to a parent not to give his children opportunity to acquire knowledge, competent for the common purposes of life. The knowledge thus acquired in schools, at an early period in life, excites an ardent curiosity, and a strong desire to pursue it in maturer years. The consequence is, that so great is the relish for literature, that many private families, have libraries for themselves, and there are many instances of the associations of neighbourhoods, who at their joint expense, purchase useful and valuable collections of books for common use. Reading has become a very common amusement, and literature a frequent subject of conversation. This has rendered the people extremely inquisitive, respecting the events that are passing in the world. To gratify this curiosity, a great number of weekly papers are published, and there are but few persons who are not at the expense of a news-paper, for their amusement and information.

When knowledge has communicated to people proper ideas respecting moral virtue, and the dignity of human nature, they will despise licentiousness and debauchery. Innocence and purity of manners, will be an object of the highest consideration, and the virtues which embellish the human character, will be in repute and in practice. While we do not pretend that our manners are perfectly pure and uncorrupted, it may be said, that they are distinguished by decorum and delicacy. We cannot expect that refined politeness, that polished elegance, which have distinguished some nations, among a people, who live in the constant practice of industry : yet for the purpose of solid happiness, our manners will yield to those of no other country. We are a fair medium between the refined dissipation and extravagant luxury of courts, and the meanness and licentiousness of a poor and uninformed people. Our citizens are open in their manners, frank in their sentiments, and sincere in their professions. They have a capacity to enjoy, and a disposition to relish the charms of conversation, and the pleasures of society. They are generally eminent for the virtues of sociability, hospitality, and friendship. They form extensive connexions with each

other, and their frequent intercourse, furnishes a rational and delightful amusement. The intercourse between the sexes, is characterized by decorum of behaviour, and delicacy of sentiment, and private families are generally distinguished by an uninterrupted enjoyment of domestic felicity.

But when we contemplate the influence of these institutions with respect to the government, they appear more conspicuous and important. We see every where good order prevail. The people universally acknowledge and express proper sentiments respecting subordination to government, and submission to the law. There are no riots, tumults, or sedition. The equal distribution of property among the people, originated from the circumstances attending the first settlement of the country, and has been preserved by the influence of our subordinate institutions. The people are too nearly upon a level, to permit many persons to accumulate great wealth: and whenever it has happened, the distribution of it by law, among his children, at his decease, has generally restored things to their proper level. This equality of condition, has had a wonderful effect in preserving the peace, and good order of the community. No man can acquire sufficient personal influence, to disturb the public tranquility. The people in general are too well informed and have too much individual consequence, to be the dupes or instruments of designing men. There are few, who are very rich, or very poor. In easy circumstances, with a moderate share of property, they are generally industrious and economical. There are few who live without labour, or an attention to business, and but few who cannot live by their labour. This banishes that spirit of indolence and dissipation, which prevails among people who have too much wealth and leisure: it restrains from the pursuit of vicious amusements, and forms a habit of perseverance and prudence. The state is divided into small farms, and the proprietor usually cultivates his plantation with his own hands. The farmers generally live in that ease and independence, which kings might envy, and are the happiest class of people on the globe.—When we survey Connecticut, providing for the education of children in their schools, laying the foundation of religious and moral instruction in their societies, managing their subordinate concerns

in their towns, establishing laws best adapted to the local circumstances of the state, in the general assembly, and then from a connexion with the government of the United States, obtaining the strength of a powerful nation, to secure them against foreign foes, and internal violence, we are surpris'd with a gradation of political institutions, that is singular and compleat. Could similar institutions be introduced into all the states of the union, the general government would be as happy as the nature of the things will admit, and as durable as time.

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CHAPTER NINTH.

OF THE PEOPLE CONSIDERED AS FOREIGNERS AND NATIVES.

**T**HE people are considered as aliens, born in some foreign country, as inhabitants of some neighbouring state in the union, or natural born subjects, born within the state.

It is an established maxim, received by all political writers, that every person owes a natural allegiance to the government of that country in which he is born. Allegiance is defined to be a tie, that binds the subject to the state, and in consequence of his obedience, he is entitled to protection. This principle is founded in the fitness of things, and nature of government. When man comes into existence, he is incapable of defending himself, and wholly dependent on government for protection; he is therefore bound by the strongest principles, to be faithful to that government to which he is indebted for such benefits.

Allegiance is either express, or implied. Express allegiance is where a subject of the state has taken that oath of fidelity to the government which is prescribed by law. An oath to support the constitution of the United States, must be taken not only by the officers of the United States, but by all the members of the state legislature, and all officers civil and military. This constitutes a public declaration of allegiance to government, and is a confirmation of natural duty: This expressed allegiance, derived to us from the oath of fealty, adopted in the feudal system, is materially varied from it, and instead of being a badge of slavery and vassalage, is an honorable acknowledgment of subjection to legal government.

Implied allegiance is that natural duty of obedience and subjection, which every man owes to that government, under whose protection he came into existence, and this duty is antecedent to, and independent of any positive engagement, and therefore, whether he swears allegiance, or not, he is equally liable to punishment for high-treason. Both these kinds of allegiance are divided into natural and local.

Natural allegiance is the perpetual obligation of obedience to government, binding on all mankind. It is a duty which they owe, and which they can never renounce and disclaim, without the consent and concurrence of the supreme power of the state. This duty is not only perpetual, but universal, and the taking an oath of allegiance to another government, does not discharge and vacate this natural obligation. It is therefore a settled doctrine that let a man remove himself into whatever country he pleases, he continues to owe allegiance to his native country, and is punishable for high treason, for joining its enemies, and levying war upon it.

Local allegiance is that subjection which every stranger, or foreigner owes to the state, while within its limits. It commences on his entering into the bounds of it, and ceases on his departure. This allegiance is therefore of a temporary nature, and results from the principle that every person owes obedience to a state, and its laws, so long as they afford him protection.

This doctrine of the common law has been adopted in all civilized nations, and no government has ever prescribed any mode by which a subject can be discharged from this natural allegiance. The doctrine of perpetual allegiance, is the law of the United States. This principle seems to be restrictive of that natural right, which every person has to remove himself to whatever country he pleases, and to join himself to such society of men, as he may choose. It would be an act of justice, as well as humanity, if nations could agree upon a certain mode by which the subject of a government could be discharged from allegiance to it, and owe that obligation only to the country to which he had removed, and where he had settled for life. But until nations will generally agree upon some uniform plan, it would be improper for any particular nation,

to subject themselves to the disadvantage of establishing a rule by which their own subjects, on abandoning their country, might be discharged of their natural allegiance, when the subjects of other governments joining them, would not be entitled to a reciprocal privilege.

All nations under greater, or lesser restrictions, have admitted of the principle of naturalization. When a foreigner becomes naturalized, he owes to the country which has adopted him, the same allegiance as a natural born subject, and at the same time is not discharged of the allegiance, he owes to his native country. The consequence is, that a man who has been naturalized, may owe allegiance to two countries, and if a war should break out between them, he may be compelled to take arms against his native country, and if captured, instead of being treated as a prisoner of war, will be legally liable to suffer death as a traitor. There are many persons who have migrated from Great-Britain, to this country and been naturalized who are in this predicament.

The congress of the United States, by the constitution, have the exclusive power, to pass laws for the naturalization of foreigners. All citizens of any of the individual states at the time of the adoption of the constitution, became citizens of the United States ; but the states then gave up the power of naturalization to congress, for the purpose that it might be exercised upon the uniform and general principles, which the relative situation of the states required. Of course, all the laws of the several states respecting naturalization are repealed, and all proceedings under them are void ; and foreigners must conform to the acts of congress, to become naturalized.

The states may pass laws prescribing the terms on which foreigners may be enabled to hold lands, the mode in which they shall be supported, and how they may gain such settlement, that they cannot be removed. They are only excluded from passing acts by which they become naturalized, and have the right of voting for officers of government. No foreigner, can on any terms be admitted to give his suffrage for any of the officers of government,

will

till he is naturalized ; and this power of naturalization is exclusively vested in the United States.

In regard to the rights and privileges of foreigners, it may be observed, that by statute they are rendered incapable of holding lands. The general expression in the statute, comprehends title by descent, as well as purchase, but whether land purchased by or descending to an alien, shall be forfeited to the state, as in England, or whether the conveyance be a nullity, is undetermined. An alien may acquire personal property, and rent a house for his habitation, which is allowed for the convenience of commercial intercourse between nations. This personal estate he may dispose of by will, and on his decease intestate, it descends to his heirs according to law. He may bring actions against any of the citizens of the state for personal injuries, and the recovery of personal property, founded on a right originating in the state ; but it has been adjudged that our courts have no jurisdiction of contracts made between foreigners, without the dominions of the United States, tho the parties afterwards come into the state. The French by virtue of a treaty with the United States, are by statute entitled to the privileges of disposing of their estate, in this state, and on their decease, the same shall descend to their heirs, and legal representatives, according to the laws of France.

It is also declared, that the free inhabitants of any of the United States, and foreigners in amity with this state, shall enjoy the same justice and law, as the subjects of this state, in all cases proper for the cognizance of the courts of judicature.

§ All ambassadors, or other public ministers to the United States, are secured in all the privileges and immunities belonging to them according to the laws of nations, and their persons, and domestic servants are exempted from arrests in civil actions. If any injury be done, to any foreign power, or the subjects thereof, in person or property, so that any damage shall result to them, or the United States, or to this state, or any particular person, such person who does the injury, shall be responsible for all damages occasioned thereby. These rights and privileges extend only to those who are alien friends, but in the case of alien enemies, during the time of

of war, they are liable to be imprisoned, if they come into the country, and their property to be taken, unless they come by virtue of a safe conduct or pass-port, and then they are protected by law from insult and injury. The children of ambassadors, tho born abroad in a foreign country, are considered as natural born subjects, because their parents are not supposed to owe a natural allegiance to the government to whom they are sent, but that which sends them, and of course their children must owe allegiance to the same power. The children of aliens, born in this state, are considered as natural born subjects, and have the same rights with the rest of the citizens.

I shall proceed to consider the mode by which persons may gain settlement in towns, and the method of proceeding against, and removing persons who are not legal inhabitants.

Our law considers persons residing here, in a threefold light : foreigners who are born in some foreign dominion : those who are inhabitants of some other state in the union : and those who are inhabitants of this state.

No foreigner can gain a legal settlement in any town in this state, unless he be admitted by the major vote of the inhabitants of such town, or by the consent of the civil authority and selectmen, or shall be appointed to, and execute some public office. In any of these ways, our law authorises foreigners to obtain legal settlements.

This statute can only be considered as making provision that foreigners may gain legal settlements in towns, so that they cannot be removed, and in case of being reduced to want, be entitled to support. And when a foreigner has complied with the conditions of the act, he gains a legal settlement only for that purpose, but the town where he gains such settlement cannot admit him to be a freeman, and to participate in the election of public officers. He must be naturalized pursuant to the act of congress, before he can be admitted to that privilege.

No person who is an inhabitant of any of the other of the United States, can gain a legal settlement in any town in this, unless he be admitted by the major vote of the inhabitants, or by the  
consent



consent of the civil authority and selectmen, or be appointed to and execute some public office, or unless he shall be possessed in his own right in fee, of a real estate to the value of one hundred pounds during his continuance therein. No time of residence will gain a legal settlement.

An inhabitant of one town may gain a legal settlement in another, by vote of the inhabitants, by consent of the civil authority and selectmen, by being appointed to and executing some public office, or by acquiring in his own right in fee, real estate to the value of thirty pounds. By a former law, a residence in a town one year without warning, or one year after warning without prosecution, gave a settlement. This law was soon found to be very inconvenient, and restrained people from removing from place to place, as convenience and interest required. To remedy this, provision was made that certificates might be given, by the towns from which such persons removed, which prevented them from gaining settlements in the towns to which they removed. But towns in many instances, finding an inconvenience in giving certificates, grew cautious, and it was found very difficult to obtain certificates. The removal of the people from town to town, became restricted and many inconveniences were experienced. In many towns, the principle was adopted to warn all persons who moved into them, which threw many industrious and enterprising persons, who wished to better their condition by a change of place, upon the mercy of the towns, from whence they came, to obtain certificates. The expense of warning and removing, as well as the trouble, and the disputes occasioned thereby, became alarming, and many began to think it would be better to repeal all the laws respecting settlements, and leave the towns to maintain those who happened to be reduced to want, within their limits, than to vex and embarrass mankind by such restriction, on the rights of removing themselves according to their interest and wishes. But the danger that some inhuman and unjust acts might be done by towns, in attempting to throw the burden upon other towns, prevented the adoption of this plan. The necessity however pointed out another plan, which while it gives individuals the liberty of removal, takes away from towns the temptation to practice fraud on each other.

f In 1792, a law was passed, which provided that any inhabitant of any town in this state, by himself, or with his family, may remove into another town, and continue therein, without being liable to be warned to depart, or to be removed therefrom, and shall gain a legal settlement in such town, in case he shall reside there for the term of six years, and shall support himself and family, without becoming chargeable to such town, or the town liable to support him, but if he be unable to support himself and family at any time before the expiration of the six years, and become chargeable to the town, that is liable to support him, he, and his family may be removed to the last place of his legal settlement. This law gives to the industrious and prudent man, a fair chance to change his residence, as his interest may require, and no town can be under any temptation to shift off their poor upon another, because such poor must support themselves six years, before they discharge the town from their liability to support them.

I shall next consider the settlements of infants, and married women.

An infant can never acquire a settlement; but he belongs to the place of his father's settlement, unless in the case of a bastard, and then his settlement is the same with his mother. If a woman be delivered of a bastard child in a town where she does not belong, her place of settlement will be that of her child. An apprentice being a minor, gains no settlement by residence with guardian or master.

If a woman marries a man who has a settlement in any other of the United States, she shall follow the settlement of her husband, tho she has never been there.

\* A wife, during her marriage, can gain no settlement separate and distinct from her husband.

ω If a woman having a settlement marries a man that is a foreigner and has none, her settlement is suspended during coverture, and his continuance with her. If she be reduced to want during the continuance of her husband with her, she cannot be sent to the place  
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f Statutes .420. j Canaan vs. Salisbury, S. C. 1790. t Town of  
Salisbury vs. Fairfield, S. C. 1789. u Law of Women, 99. Busut's  
Justice, Art. Poor. ω Ibid.

of her settlement, because as it is not the settlement of her husband, he cannot be sent with her, and the law will not admit the separation of husband and wife. They must both be considered as vagrants wherever they are, and may be treated as such, and of course may as well be in one town as another. But if the husband dies, or leaves her, then her settlement revives, and the suspension ceases; for the law will not admit that a person, who has a settlement, shall loose it till another is gained. In such case therefore, the wife may be sent to her place of settlement, before the marriage, and all her children, wherever they were born, will follow her settlement. These rules apply only to foreigners, and not to persons who are inhabitants of any of the other states in the union. These principles were settled in the two following cases.

x A foreigner residing in the town of Windham, married a woman whose settlement was in Norwich. Several children were born, and the husband left the wife, and went to some place unknown. The selectmen of Windham, procured the wife and children to be transported to Norwich, for which an action was brought against the town of Windham. The superior court adjudged that the desertion of the husband, from the wife, had revived her right of settlement, which was suspended during his continuance with her, and that as the children could gain no settlement by themselves, they must follow the mother.

y A woman that had a settlement in Windham, was certificated to Norwich, where she married a man who had a settlement in Norton, in Massachusetts. Her husband removed her out of the state, and left her, and by various removals she came to Norwich, who transported her to Windham, for which action was brought. On the trial it was contended on the part of Norwich, that as she once had a legal settlement in Windham, and a certificate thereof had been given to Norwich, that they had a right to send her to Windham, and if she did not belong there, they were bound to look out for her settlement; that she had married a man who had no settlement in this state, and as he had left her, she might be sent to her place of settlement in this state, before her marriage, on the idea that the same principles would apply to her husband, as

if

x Town of Norwich vs. Town of Windham, S. C. 1790. y Windham vs. Norwich S. C. 1792.

if he was a foreigner : but the superior court sustained the action, and adjudged that the woman by marrying an inhabitant of another state, lost her settlement in Windham, and followed the settlement of her husband, who could not be deemed in the light of a foreigner ; and that therefore she ought to have been sent to the town where her husband belonged, whether he was there or not.

The statute law has provided for the removal of persons from towns, where they have no legal settlement ; and for their punishment in case they continue to reside therein, after having been warned to depart.

*a* A foreigner likely to become chargeable to the state, or who is of an immoral, or vicious character, may by order of the county court, or an assistant, and justice of the peace, or two justices (quorum unus) be transported to the place of his legal settlement, or to some place, within the jurisdiction of the state, or Nation to which he belongs, whenever such authority shall judge it expedient, and that the expence will not exceed the advantage, to be paid by the state if such person be unable.

*a* If any person who is an inhabitant of any other of the United States shall come to reside in any town in this state, the civil authority, or major part of them are authorised upon application of the selectmen, if they judge proper, by warrant under their hands, directed to either of the constables of said town, to order such person to be conveyed to the State, from whence he came, at the expence of such town.

*b* If an inhabitant of any town shall reside in another, and within the term of six years shall become unable to support himself, and family, and become chargeable to the town liable to support him, he may be removed in like manner ; and where persons removed as aforesaid shall return back to the town, from which they were sent, and abide therein, after warned to depart, they shall be whipped on the naked body, not exceeding ten stripes, and may be removed as often as there shall be occasion.

*c* The selectmen of any town, are authorised by themselves, or by warrant from an assistant, or justice of the peace to warn any  
Z 2  
foreigner

*a* Statutes, 82.

*a* Ibid. 383.

*b* Ibid. 383, 420.

*c* Ibid. 383.

foreigner, or person belonging to any other of the United States, not having become inhabitants of such town, to depart the same, and the person so warned shall forfeit, and pay to the treasurer of such town, ten shillings per week, for every week he shall continue therein, after warning, and if unable to pay shall be whipped on the naked body, not exceeding ten stripes, unless he shall depart the town within ten days after sentence given, and reside no more therein without leave of the selectmen.

If any inhabitant of any town, shall hire, or entertain, or let any house, or land to any foreigner or inhabitant of any other of the United States, unless he first give security to the acceptance of the authority and selectmen, to save the town harmless from expense, shall forfeit, and pay to the treasury of the town, ten shillings per week. The selectmen are directed, and empowered to prosecute all breaches of the act.

By the statute removals are by warrant and not by order. The law has not vested any description of men with the power of making an order, for the removal of a pauper, and then given the liberty of an appeal from such order to the town where such pauper is removed, in case they dispute his settlement in such town, and wish to try the question. When a pauper is sent to a town, to which he does not belong, such town has a right by warrant to remove him to his place of settlement, but may not return him to the town from which he was sent, unless it be his place of settlement. But in all cases where a town removes a pauper, to a town of which he is not an inhabitant, an action of trespass on the case will lie in favor of the injured town, by which the place where the pauper is legally settled can be ascertained. But as towns are sometimes unwilling to commence actions, paupers have sundry times been removed between towns, before an action was commenced, by which they were much distressed, and injured. It would therefore be more consistent with humanity, and justice, to authorize certain authority to make orders of removal, and then if any town contested their validity, give them an appeal to some superior jurisdiction, where the right of settlement could be fairly, and definitively determined : and not permit towns to harass the poor

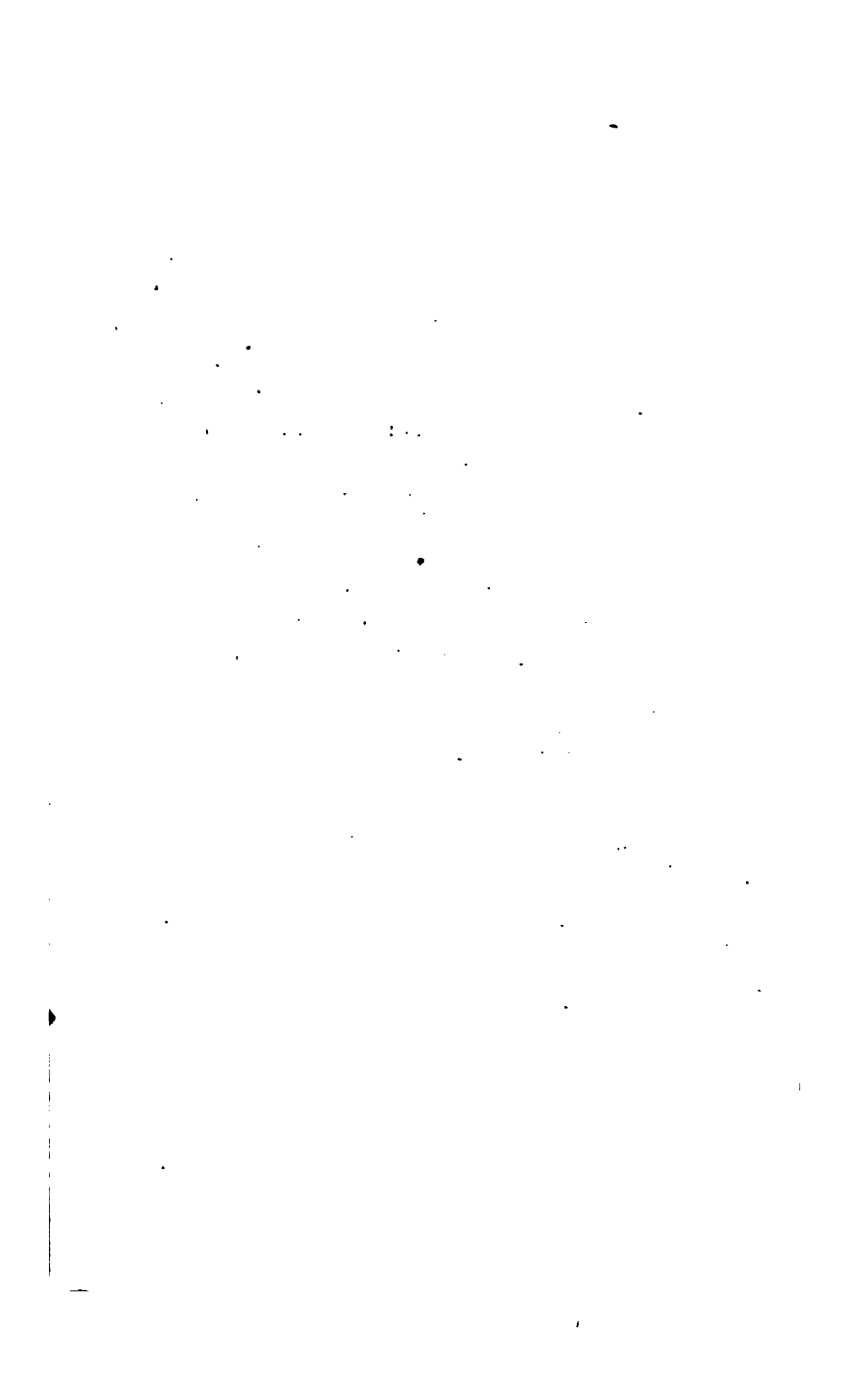
poor by sending them backwards, and forwards, as long as they pleased, till they are disposed to settle the question legally.

*d* If any person shall by reason of sickness, in any town where he does not belong, occasion a charge to such town, the selectmen shall lay the account thereof before the county court in the county, where the town is to which such person belongs, who having adjusted, and allowed the same, as they think reasonable shall order payment thereof by the treasury of such town, or in want thereof by the selectmen, and award execution accordingly; provided that such person be unable to support himself, and has no master, or relations liable to support him.

*e* In all cases where a town have incurred any expense in providing for the support of a pauper, belonging to another town, action of assumpsit will lie at common law notwithstanding the provision of the statute, to recover such expense, and this is the most usual method to decide the legal settlement of paupers.

Formerly where a pauper was to be removed to a distance, he was sent by constables from town to town, to the place of settlement; but now the town removing him, must send him to the place where he belongs. A practice was once introduced of transporting paupers through the state, by constables from town, to town, where they wished to send them from one state to another, as from New-York to Rhode-Island, but to save such expense, the statute law provides, that any person who shall bring any poor and indigent person, into any town in this state, of which he is not an inhabitant, and leave him there, shall forfeit twenty pounds to the use of such town.

*d* Statutes, 228. *e* Town of Thompson vs. town of Wallingford, S. C. 1791. *f* Statutes 420.



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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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## BOOK SECOND.

### Of the Rights of Persons.

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#### CHAPTER FIRST.

##### OF RIGHTS IN GENERAL.

**I**N the first book of our enquiries, we have treated of the constitution and form of government, established to support the rights and redress the wrongs of the people. The power and duty of every person who acts in a public capacity, have been fully delineated, and the jurisdiction of courts that administer justice, has been clearly defined. We come next to consider the rights of individuals, the preservation of which, is the highest duty of public officers, and the ultimate object of legal government. For the more accurate comprehension of this subject, it is proper to observe that persons may be branched into several divisions. Persons are public and private. Public persons have already been considered as being the instruments by which government is maintained and executed. Private persons are the subjects of government, and derive from it, the exercise and enjoyment of certain rights and privileges. Persons are again divided into natural and artificial. Natural, are such as are formed by the hand of nature. Artificial, are such as are formed for the purposes of society, as corporations, and bodies politic.

When we consider man, as the subject of civil law, we are to  
contemplate



contemplate only certain rights, from the peaceful enjoyment of which results the highest happiness which he is capable of attaining. If the exact extent of these rights were indisputable, and the observance of them held sacred and inviolable, there would be no necessity of law or government. But the different ideas of mankind respecting right, and the general propensity to infringe it, have laid the foundation of civil institutions. This infringement of right is denominated, wrong. When we have ascertained the rights, we easily see, that the deprivation, or violation of them constitute those injuries or wrongs, which it is the object of courts to redress. The restoration of these rights, when taken away, and the restitution of adequate compensation, when violated, are those exercises of government which are denominated, justice.

Rights are of a twofold nature, absolute, and relative. Absolute rights belong to men in their individual capacity. These are three, and are denominated the rights of personal security, personal liberty and private property. Relative rights respect mankind in their social connection with each other. These are the relations of husband, and wife ; parent, and child ; guardian, and ward ; master, and servant.

While we are contemplating the rights of man, it may with propriety be remarked, that they are divided into natural and civil. Natural rights are such as appertain to individuals in a state of nature—Civil rights result from the institution of society—But it must not be imagined that natural rights are essentially different from civil, for the natural rights are the basis of civil. Natural rights consist in our possessing, and enjoying the power, and privilege of doing whatever we think proper, without any other restraint than what results from the laws of nature—The inconveniences that mankind have experienced in this situation, has induced them to enter into the social state, by a resignation of some portion of natural rights, for the purpose of acquiring complete security for civil rights.—Natural Rights are converted into civil by subjecting them to certain restrictions and limitations, by which they are rendered secure, and permanent. Civil rights may therefore be defined to be the exercise and enjoyment of natural

ral rights, in that limited qualified manner, which is prescribed by law, and is necessary to their security, and the peace and good order of society, and by reason of which, he acquires certain other civil rights, resulting from the social state. When an individual resigns part of his natural liberty, to a superior, he thereby gains the aid and assistance of that superior, in guarding and defending his right of civil liberty, against all illegal encroachments. When a man submits to the rules and forms of law, in the acquisition of property, he finds those rules and forms render the enjoyment of it safe and permanent.

Our entering into a state of society, does not restrict us in all our natural rights, but many are left untouched. Mankind are restricted from injuring each other in person, character, and property; and are inhibited from committing certain crimes, which endanger the existence of society. But they possess all the freedom of the natural state, in the exercise of the acts of humanity, generosity, and benevolence: in the formation of the connexions of friendship, and in that intercourse between each other, which constitutes the manners of the country. The rules of conduct are derived from common opinion and general custom. Nations are not less distinguished by the refinement of manners, and the progress of civilization, than by their laws and government. This subject belongs however to the investigation of the moral character of man; but as these enquiries respect him only in his civil capacity, I shall consider those rights only which are denominated civil, and the violation of which is punished by compelling the wrong doer to make reparation to the party injured.

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## CHAPTER SECOND.

### OF THE RIGHT OF PERSONAL SECURITY.

**P**ERSONAL security consists in a man's having the peaceable enjoyment of life, limbs, body, health, and reputation.— 1. The preservation of life is an object of the first consequence in all governments, and the taking of it away is punishable with death. To the person injured, no reparation can be made, and therefore the

public only can prosecute the offender. In England, an appeal is given to the wife, or son of the deceased, against the murderer, who on conviction, cannot be pardoned: but here, no such mode of prosecution has been admitted. § The law regards an infant even in the mother's womb, and if it be in any way killed, it is a great misdemeanor. It is also capable of taking a legacy, and an estate limited to its use.

Life is the gift of God, and the most important right that mankind enjoy. No man has a right to dispose of, or take away his own life, nor may it be destroyed by any of his fellow creatures, on their own authority; but as it has been found necessary to maintain civil government, that the power of taking away life, for the commission of certain crimes, immediately tending to its dissolution, should be vested in the supreme power of the state, it has therefore become a principle in all countries, that the legislature may inflict the punishment of death, on certain crimes of the deepest die. The law has not only established those bulwarks to guard this sacred right, but has authorised individuals to exert their own strength and power, to defend their lives when attacked, and they may legally take away the lives of the assailants, to save their own. A man may avoid a contract, into which he is compelled to enter, through fear of losing his life.

2. § The preservation of a man's limbs, is an object attended to by law, and especially the eyes, tongue, and privy-members, being those limbs which are of the highest consequence in the enjoyment of life. The destruction of them is denominated, mayhem, and the crime is by statute, punishable with death. i By the common law, mayhem extends to all limbs that may be useful to a man in fight, and the crime is punishable with death: but the mildness of our statute has moderated the rigor of the common law. The law not only guards the limbs of a man, but he has a right to take away the life of another, in defence of either of his members. As the loss of a member is irreparable, the law will not oblige a person to suffer it, but will authorise him to defend it, at the expence of the life of the assailant; but to avoid a mere battery, the law will not authorise the commission of homicide, because, com-

penation.

penfation can be made for the injury. A man may avoid a contract which he makes, through a well grounded fear of mayhem, or lofs of limb, which is called *dureſs by threats*.

3. \* Not only is a man protected againſt lofs of limb, but the body and the limbs, are protected againſt all menaces, aſſaults, beating, and wounding. Such acts are a breach of the peace, and puniſhable by fine. The perſon injured, has an action of treſpaſs for aſſault and battery, againſt the wrong-doer, to recover damages for the injury he has ſuſtained. This ſecurity of our body and limbs, from all corporal injuries, is an ineſtimable right. When we come to conſider the various kinds of actions, to obtain redreſs for injuries, we ſhall ſpecificate thoſe acts, which are an infraction of this right, and for which a remedy is given.

4. The preſervation of health, ſo eſſential to the enjoyment of the bleſſings of life, is regarded by law. An action lies for a perſon to recover damages for any injury he ſuſtains in that reſpect. The legiſlature have been careful to preſerve the health of the people, by preventing the introduction of contagious diſorders, and their ſpreading when introduced.

5. A man's reputation and good name, is ſecured from flander, detraction, and defamation. A good character, is the ſource of ſome of our higheſt enjoyments, and the preſervation of it from the blaſt of envy, and the tongue of malice, is one of the moſt eſſential benefits we derive from ſociety. Whoever attempts to wound the reputation of another, by ſpeaking flanderous words, ſpreading defamatory reports, publiſhing ſcandalous libels, or exhibiting ludricous pictures, ſhall answer to the party injured all damages that he ſuſtains, by ſuch unjuſtifiable conduct.

The nature and extent of theſe rights will be eaſily comprehended by this concise deſcription. It is difficult to ſay much about them, without taking into conſideration thoſe acts, which amount to a violation of them. This belongs to that part of our enquiries, that relates to perſonal wrongs, and their remedies, which muſt be deferred, till we treat of that ſubject, and then this point will be reſumed, and largely diſcuſſed.

\* 1 Black. Com. 134.

## CHAPTER THIRD.

## OF THE RIGHT OF PERSONAL LIBERTY.

**T**HIS sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this state in as full extent, as in any country on the globe, and in as high degree as is consistent with the nature of civil government. No individual, or body of men, have a discretionary, or arbitrary power to commit any person to prison; no man can be restrained of his liberty; he prevented from removing himself from place to place, as he chuses; he compelled to go to a place contrary to his inclination, or be in any way imprisoned, or confined, unless by virtue of the express laws of the land. These laws are so clear and explicit, that it is in the power of every man to avoid breaking them, and if he be committed to prison, it must be the effect of his own fault.

In matters of a criminal nature, tho every offender may be apprehended by private persons, yet they must be immediately carried before proper authority, complaint must be entered by some informing officer, the court must make enquiry respecting the truth of the accusation, and if a probability of guilt appears, the offender may be committed to prison, and held for trial. But without such a proceeding, no criminal can be imprisoned, and even then it can be done only for capital offences; all others being bailable; and the criminal will not be imprisoned, if he be able to procure bail. If the offence be not bailable, or the criminal unable to procure bail, he committed to prison, there are courts of law constituted for the trial of all offences, which sit so frequently, that a person can lie in a prison but a short time, before he will have a fair opportunity of manifesting his innocence, or of being proved guilty, and obtaining his enlargement, by suffering the punishment that his crime deserves.

How different is this from the practice of all despotic governments. There the monarch has power to commit a man to prison, upon any pretence whatever, and there detain him so long as he pleases, without bringing him to trial; nor is there any method for the subject to obtain his liberty, enlargement, or trial, without  
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the content of the despot. Many instances have happened, where innocent persons who had rendered themselves obnoxious to a tyrant, have been confined for years ; and have even languished out their miserable lives in the solitary mansions of a prison, destitute of the comforts and pleasures of life, and secluded forever from the company and conversation of their families, their friends and the human race. To what a state of degradation and meanness, must the minds of men be reduced, to be quiet and peaceable amidst the terrors and cruelties of such a government. How enviable is our situation, when compared with almost every country on the globe, and how much reason have we, not only to be obedient to our laws, but to exert every power to defend and maintain a constitution which will render us the freest and happiest nation in the world, if we have a disposition to enjoy those privileges which Heaven has bestowed upon us.

No person can be imprisoned in cases of a civil nature, if he be able to pay the debt. If he be unable, he may be imprisoned by precept from lawful authority. If a man will be so imprudent as to involve himself in debts, that he cannot discharge, he must suffer imprisonment, as a consequence of his imprudence and folly. But even then, if he can procure bonds, he may enjoy certain liberties adjacent to the prison, and is not subjected to the horrors of close confinement. If he be so poor that he cannot pay the debt nor support himself, the law allows him to take an oath, that he has not estate to the value of five pounds, on which he shall be discharged from prison, unless the creditor furnishes him with support.

Every confinement of a person, in any shape, is called an imprisonment, and if it be done without legal authority, it is false imprisonment. The legality of imprisonment, consists in its being done by process, precept, or warrant, from proper authority, having power to commit ; which must be in writing, signed by such authority, and expressing the cause of commitment..

If a man be illegally restrained of his liberty, an action of trespass will lie to recover damages, and if he be compelled to execute a contract, to obtain his liberty, he may avoid it. This is called  
duress

duress by imprisonment: but if a man be lawfully imprisoned, and execute a contract to obtain his discharge, then such contract will be binding.

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#### CHAPTER FOURTH.

#### OF THE RIGHT OF PRIVATE PROPERTY.

**T**HE original right to property is founded in the nature of things. It consists in the power of using and disposing of it, without controul. But in a state of society, it became necessary for the mutual convenience of mankind, that this natural right should be laid under certain restrictions and limitations. We therefore do not appeal to the laws of nature for the title to the property we possess. This would open the door to endless controversies and disputes, and would be in a measure reverting to a state of nature. But that property may be upon a certain, permanent foundation, there have been certain positive rules adopted by mankind, which govern the acquisition, the use, and the disposition of it. These are calculated to give the possessors a more perfect enjoyment, than can be derived from natural law, and thereby compensate for those rights which are resigned, upon entering into society.

The laws of this state respecting property, are founded upon principles of justice and good policy, and secure to the people, the most enlarged powers and privileges. Every man in the exercise of common reason, is capable to acquire property, to use and improve it in such manner as he thinks fit, if he injures no other person, and to convey, transfer, and dispose of it as he pleases, in conformity to certain rules and regulations prescribed by law. Every person has a clear title to the property he acquires, in his own right, independent of any superior whatever, and no one can deprive him of it, without his agreement and consent, unless by force of express law. There is no supreme authority, that possesses an arbitrary power to take away the property of any person without his consent, express or implied, even for the support of civil government. The general assembly who are elected by the  
people

people, and to whom they delegate the power of consulting and acting for the general good, have a right to impose taxes upon the people, for the purpose of defraying the necessary expenses of government. But as they are the representatives of the people, the people do in fact virtually assent to every tax that is granted, and thereby have a complete security against all unreasonable and unnecessary impositions of public burdens.

It would be a matter of curiosity to compare our condition, with the greater part of the nations of the earth. In some of the most fertile countries of Asia and Africa, where the spontaneous productions of nature, furnish the inhabitants, with all the luxuries and elegances of life, the despotism of government, has rendered them completely wretched and miserable. The title to their property is dependent on the arbitrary will of the master, and all the wealth they can accumulate, is perpetually exposed to be taken from them, by the hands of the rapacious vultures that govern them. Under such a government, genius droops, industry languishes, woe and misery reign triumphant, and happiness is banished from the land.

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#### CHAPTER FIFTH.

#### OF HUSBAND AND WIFE.

THE connexion between husband and wife, constitutes the most important, and endearing relation, that subsists between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful passions, is productive of the purest joys and tenderest transports, that gladden the heart.

This connexion between the sexes, has been maintained in all ages, and in all countries; tho the rights and duties of it have been very various, as well as the modes and ceremonies, by which it is contracted. The most general principle that has been adopted is that a man shall have but one wife,—but in the southern climates, and in the countries where the dreary religion of Mohamed has prevailed, polygamy has been introduced, the women have been treated as slaves, and considered as merely the objects of lust

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and sensuality. The manners of the people, in consequence of this practice, are barbarous, unpolished, and unsocial. Among savage nations, the women are treated as beings of an inferior order, and are subjected to all the rigor and hardship of slavery. The progress of nations to civilization and refinement of manners, is marked by an encreasing attention to the female sex, and society may be said to have arrived to the highest point of improvement, when the charms of their beauty and the softness of their virtues are united in bestowing the sweetest joys on domestic life, when they are considered as the equal companions and friends of the other sex, and when the intercourse of the sexes is regulated by sentiments of decency, delicacy and propriety. Perhaps no country has a better right to boast of this state of manners, than America.

Marriage has been deemed a civil contract, in all countries, excepting where the christian religion has flourished. When this religion was established, marriage was taken under its special guidance and direction, and the union of the two sexes was considered in a very different light from what it was considered by the Pagan nations. Such are the extravagant absurdities which have been adopted that it is a truth, that the doctrine has been holden, that a man who has tasted the purest domestic pleasure, in the arms of a virtuous and lovely wife, becomes polluted, and unfit to minister in holy things, at the altar of God, and that the abstaining from those endearing pleasures, to enjoy which we are impelled by the strongest propensity of the human heart, is the most acceptable sacrifice to that Being, who created us, and implanted in us the very principles that this doctrine counteracts. From this source has flowed the celibacy of the clergy and the monastic institutions, where a perpetual warfare between mistaken duty and natural passion, has rendered these victims of superstition, the most wretched of mortals.

The Roman catholics have advanced the contract of marriage to the dignity of a sacrament, and rendered it a powerful and successful engine, to promote the aspiring views of the clergy. In England, marriage is considered in a great measure, as a matter of spiritual jurisdiction. The law points out certain modes to be pursued

sued to compleat the contract, and deduce the consequences resulting from it. But the celebration and dissolution of it, and the punishment of all crimes respecting it, are left to the ecclesiastical courts, who punish only for the good of the soul.

But in this state, we have happily thrown off those shackles which the devices of men had invented to render mankind miserable, under the pretence of rendering them religious and preparing them to be happy. This contract, by our law is considered merely in a civil light, and the clergy have no power, but to celebrate the marriage, by virtue of express law, in the same manner as the civil magistrate. All crimes that can be committed by an unchaste and illegal intercourse between the sexes, are punished by the courts of common law.

For a clearer comprehension of this subject, I shall distribute it under the following heads :

- I. How the contract of marriage may be made, and published.
- II. How it may be dissolved.
- III. How it operates upon the acts of the wife, previously done, and of agreements between them during marriage.
- IV. The power which marriage gives the husband, over the estate of the wife.
- V. How far the husband is chargeable with the debts of the wife, contracted before, or after marriage, and of a wife who is executrix, or administratrix.
- VI. When a husband and wife must join in suing, and be joined when sued ; and when the wife may sue, or be sued as a single woman.
- VII. Of the power of the husband over the person of the wife, and her remedy for any injury done her, by him.
- VIII. How far the acts of the husband, or wife, alone, or jointly with the wife, will bind the wife.
- IX. Of the crimes of the wife, where she alone shall be pun-

ished, and where the husband is answerable for what she does in a civil action. Of each of these, I shall treat in their order, and,

1. How the contract of marriage may be made, and published. Under this head, it must be observed, 1. That the parties must be of ability and capacity to contract. 2. They must in fact make a contract, and 3. The contract must be executed and published according to the forms and ceremonies required by law.

1. In regard to the ability of persons, it must be noted, that in general all persons have the power, unless they are disqualified by some particular disabilities or impediments.

1. Want of age incapacitates persons to make this contract. \* The age of consent is fourteen for boys, and twelve for girls; if they marry under those ages, the marriage is imperfect, and the parties when they arrive to the age of consent, but not before, may agree to the marriage, which renders it valid without further celebration, or disagree which renders it void. If one of the parties be above, and the other under the age of consent, then the party above such age, may disagree, as well as the other, for both must be bound, or neither; but such party cannot disagree, before the other arrives to the proper age.

2. Consanguinity and affinity, between persons, disqualify them to make this contract. \* The statute law which is copied from the Levitical law, prohibits all persons within certain degrees of propinquity, by blood or marriage, from intermarrying, declares void such marriages, bastardizes the issue, and punishes with great severity, such incestuous conduct. \* All marriages between persons related in the ascending or descending line, to the remotest possible degree are prohibited, on the principles, that such incestuous connection is repugnant to the law of nature, for the mother would never preserve and educate the female issue, if the father might have access to them, nor the father the male issue, if they might ascend the bed of the mother: that it destroys the natural duties between parents and children; for the parent could never maintain that authority, which is necessary for the education and government of the child, nor the

\* 1 Black. Com. 436. 1 Bac. Abr. 228. 3 Ibid. 159. Co. Lit. 79.  
\* Statutes, 136. Lev. xviii. \* 3 Bac. Abr. 571.

child that reverence that is due to the parent, if such indecent familiarities were admitted : and there seems to be the same natural reason, which exists in the brute creation, that it is necessary to cross the strain, to continue the species compleat : for there may be the same tone and figure of blood, and a similar conformation of vessels, between near relations, which would render their issue torpid and inactive. While a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigor, and ability to the animal œconomy.

The prohibition of marriage among collateral relations, extends to the third degree, and tho the reason be not the same, as among lineal relations, yet the law is founded in good policy. The marriage of brothers and sisters, who must be educated together, and of uncles and aunts, with nephews and neices, who from the nearness of their relation must be familiar with each other, would open the door for such frequent and convenient opportunity for every species of lewdness and debauchery, that a universal corruption and depravity of manners would follow, and chastity and innocence be banished the world. Every family would be confined to itself in the exercise of licentiousness and wickedness ; for such conduct would prevent the extension of family connections : a friendly intercourse which polishes and improves the manners of mankind, would cease to connect the different members of the community, and the diffusion of love and charity, would no longer augment the happiness of mankind.

The extension of the prohibition of marriage to relations by affinity, is grounded on the idea that husband and wife become one person. It is true that the human heart does not feel that natural horror, and aversion against a connection with persons related by affinity, as consanguinity, but so far as the same danger of debauchery of manners arises from it, there is undoubtedly a propriety in extending the prohibition.

3. *p* A prior marriage, or having a husband or wife living at the same time, disables persons from making this contract. If they attempt it, the marriage is void, and they are liable to severe punishment.

4. *g* A want of reason is another disability. An idiot is wholly incapable of entering into a matrimonial contract, so is a lunatic, unless in a lucid interval. But if the misfortune to be deprived of reason happen to a person after marriage, there is no provision in law to annul it.

5. *r* When the parties are within age, the law requires the consent of the parents and guardians (if any) of such persons, as are under the care and controul of parents and guardians, upon penalty that any persons who have a right to perform the ceremony of marriage, shall pay a fine of twenty pounds, if they marry persons without the consent of the parents and guardians; one half to any common informer, and the other to the county treasury; but the marriage however is valid.

2. *f* The parties must in fact make a contract, which arises from their mutual agreement and consent, when they labor under no legal disability, for it is not a familiar intercourse between the parties, but their consent, that constitutes the contract. By the law of nature, and by the imperial or civil law, a mutual contract, as I marry you; you and I, are man and wife, is a marriage in fact, which the parties cannot release but by mutual agreement. A promise to marry in future, would by the cannon law be enforced in the spiritual court; but either party could release it, and marriage to another, dissolved it. But by our law no act of the parties alone can make the marriage valid, and no court can compel the specific performance of a marriage contract; but these contracts are so far countenanced by our law, that if either party refuses to fulfil an executory contract of marriage, an action will lie in favor of the injured party, for the recovery of damages, and courts have sometimes given large damages in such cases. But here the special circumstances of the case must be taken into consideration. If the plaintiff be a woman of a fair character, and the consequence of the promise was her seduction, then the most exemplary damages ought to be given, to make all possible reparation for the greatest injury that a woman can sustain. These promises are good tho no time be agreed on, but it is necessary to entitle the party to an action, to aver an offer of marriage and refusal. It has been determined

*g* 1 Black. Com. 438. *r* Statutes 136. *f* 3 Bac. Abr. 5, 6. *t* Ibid. 574, 575.

terminated that marriage is an advancement and benefit to a man, and that of course he may bring an action for the breach of a marriage contract. The action must be founded on mutual promises, for if it be on one side only, it is a naked agreement, and not binding.

■ If a man of full age, and a girl of fifteen, promise to intermarry, and the man be guilty of a breach of contract, an action will lie against him in favor of the woman, for tho the contract was voidable as to her, yet the man shall be presumed to act with sufficient caution, otherwise the privilege allowed to infants, to rescind their contracts, which was intended for their benefit, might operate to their prejudice.

3. This contract must be published and executed according to certain forms, and ceremonies prescribed by law.

■ Before a marriage can be legally celebrated, it is requisite that the intention of the parties be published in some public meeting or congregation, on the Lord's day, or on some public fast, thanksgiving or lecture-day, in the town, parish, or society, where the parties, or either of them ordinarily reside, or such intention be set up in writing, upon some post or door of their meeting-house, or near the same in public view, there to stand so as to be read, eight days before the marriage.

Magistrates, justices of the peace in their own county, or jurisdiction, ordained ministers in the county where they dwell, and during the time they continue settled in the work of the ministry, are only vested with the power of joining persons together in marriage, and an attempt by persons of any other description is void, and ineffectual.† These regulations have been thought necessary for the purpose of rendering this contract, which is of so much consequence to civil society, more serious, solemn and deliberate, to give notice to parents, and all who are interested, of the intention of the parties, so that measures may be taken to prevent it, if unwarrantable or illegal, and to stop all private and clandestine marriages; but if the marriage be celebrated without consent or publication, it is valid, and the performer only liable to the penalty.

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■ 3 Bac. Abr. 574. w Statutes, 136.

† An erroneous opinion has prevailed, that any person not a minister, or justice of the peace, may join persons in marriage, but this opinion is clearly against law, as well as the decisions of the superior courts.

The law has not pointed out any mode in which marriage shall be celebrated ; but has left it to the common custom and practice, which has been established from time immemorial. But it may be observed, that any form of words which explicitly constitute a contract and engagement from the parties to each other, and published in the presence of, and by a legal officer, will amount to a marriage according to law.

## II. We consider how the contract of marriage may be dissolved.

Before the establishment of christianity, and in all countries where that religion has not been received, the contract of marriage, has not been considered of an indissoluble nature ; but divorces have been allowed upon a variety of principles. In the rude ages of society, when the manners are rough and unpolished, wives are deemed to be the slaves of their husbands, and they have the power of divorcing them at pleasure. As the manners of the people improved, the laws introduced some regulations, to restrain the unreasonable exercise of this arbitrary power ; but even in the most polished periods of the Grecian and Roman States, divorces were admitted on the most trifling pretences. As the manners of the people became more polished, the condition of wives grew more tolerable, and they were allowed the privilege of obtaining divorces, as well as the men. In the early and virtuous period of the Roman republic, it is remarked as an evidence of the purity and simplicity of their manners, that notwithstanding the facility of divorce, there did not happen an instance for the space of five hundred and thirty years. Moses, the inspired legislator of the chosen people of God, has declared, that if a man marry a wife, and she find no favor in his eyes, by reason of some uncleanness, he may give her a bill of divorcement, and dismiss her from his house. The vesting in the parties, the power of divorce upon such trivial pretexts, must have opened the door to every species of debauchery and wickedness. It destroys all that restraint upon the conduct of married persons, which is imposed by the consideration, that they cannot dissolve the connection. It inflames those trifling controversies, which so often happen, and lessens the necessity of exercising mutual charity and forbearance. It cherishes the natural propensity

penalty to variety, by facilitating the means of obtaining it. The holy author of the christian religion, in purifying the Mosaic institution, has adopted sentiments of a very different nature. Two of his evangelical historians, ascribe to him a prohibition of divorce in all cases, and one qualifies the prohibition by the exception of one crime, described by a word of doubtful meaning in the original, but which according to the vulgar translation, cannot be committed by a woman after marriage. Hence all the christian nations immediately admitted the doctrine, that divorces are repugnant to the positive precepts of the religion which they profess, and of course they have been prohibited in all cases, except for reasons existing prior to the marriage, which rendered it void. In England, in cases of adultery, a divorce from bed and board only, is allowed, which prevents another marriage. The reformation which relieved mankind from so many unnecessary restrictions, upon their happiness, produced no alteration about divorces. The rendering the contract of marriage indissoluble, is running into the opposite extreme from that of permitting divorces at the pleasure of the parties. There are many persons, who on the idea that the marriage contract cannot be vacated for any misconduct they are guilty of, will not behave with that propriety that they would if the continuance of the contract were dependent on their exertions to render themselves agreeable to the persons with whom they are connected. It is a great hardship that a person who has been unfortunate in forming a matrimonial connection, must be forever precluded from any possibility of extricating himself from such a misfortune, and be shut out from enjoying the best pleasures of life. This consideration, instead of adding to the happiness of the connection, must frighten persons from entering into it. It is therefore the best policy to admit a dissolution of the contract, when it is evident that the parties cannot derive from it the benefits for which it was instituted; and when instead of being a source of the highest pleasure, and most endearing felicity, it becomes the source of the deepest woe, and misery.

In this state the legislature has wisely steered between the two extremes. We neither admit that marriage is indissoluble, so as to involve a person in wretchedness for life, who is unfortunate in forming



forming a matrimonial connection ; nor do we allow it to be dissolved upon such slight pretences, as give the parties the power of releasing themselves from it, when whim, caprice, or a relish for variety shall dictate. Substantial reasons only, which shew that the design of marriage is defeated, will have influence, and the validity of these reasons must be judged of by a court of law, and not by the party themselves. The institution of a court for the decision of such controversies, and the limitation of their power to such cases as the public good requires to be remedied, gives the practice adopted by our laws, a decided preference to the practice of all other nations, and renders our mode of granting divorces, as favourable as the other modes have been unfavourable, to the virtue, and the happiness of mankind. The wisdom and good policy of this law, is evidenced by the consideration that in no country, is a greater share of domestic felicity enjoyed, than in this state.

\* Bills of divorce may be granted by the statute respecting such cases, for adultery, fraudulent contract, wilful desertion for three years, with total neglect of duty, or seven years absence of one party not heard of. The practice has been to grant women divorces, where their husbands have been guilty of a criminal connection with unmarried women, which crime tho by law amounting only to fornication, has been included under adultery. Application must be made by petition to the superior court, stating the reason for the divorce, and twelve days notice must be given to the opposite party if within this state. On proof of any of the above recited facts, the superior court will grant a divorce to the aggrieved party, who is then deemed and accounted single and unmarried, and may lawfully marry, or be married again. The reasons of divorce by statute are such, as arise subsequent to the marriage, excepting in the case of fraudulent contract. The issue, however, in no case will be bastardized by the divorce, because the marriage is legal and valid, till annulled, not absolutely void, but only voidable. In cases of incestuous marriage and bigamy, they are absolutely null and void, and of course the issue are bastards.

† The superior court have power to assign to any woman so separated, such reasonable part of the estate of her late husband,

\* Statutes, 41,      † Statutes, 137,

as in their discretion the circumstances of his estate may admit, not exceeding one third.

\* By the common law of England, corporal imbecility, frigidity, or perpetual impotency, existing prior to the marriage was a ground of divorce from the bond of matrimony. In our statutes, nothing is mentioned of this reason, tho perhaps it may be comprehended under the idea of a fraudulent contract—for we cannot form an idea of a greater fraud, than for one person to marry another when labouring under a perpetual incapacity to perform the essential duties of the contract. But this point remains to be settled in future, as no application has ever been made on this ground to the superior court.

Such is the power delegated by the legislature to the superior court; but they have reserved to themselves, the power of granting divorces in other cases. Frequent applications are made to the legislature for such purposes, and it seems to have been adopted as a general rule, that in all cases of intolerable cruelty, and inveterate hatred, and such gross misbehaviour and wickedness as defeat the design of marriage, and presumptive proof of a criminal connexion with another person, where the positive proof required by law cannot be had, divorces may be granted. The reasons for which the legislature grant divorces, are clearly warranted by sound policy. It would however be less expensive to the state, and equally safe for the community to delegate the same power to the superior court.

The Statute warrants no divorce from bed and board, but all divorces must be in total, and from the bond of matrimony.—The legislature however, in one instance under the special circumstances of the case, have granted a divorce from bed and board. This precedent ought not to be imitated, for it is placing them in a situation, where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity, or more virtue than usually falls to the share of human beings.

III. The operation of marriage on the acts of the wife, previously done, and of agreements between them during marriage,

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= 1 Black. Com. 440.

a The husband and wife in legal consideration are one person, her existence is united with and swallowed up in that of the husband. This union of the husband and wife, operates as an extinguishment, or revocation of several acts done by her before the marriage. The general rule is, that all acts shall be revoked, or extinguished, when it is for the benefit of both ; but when it will manifestly be to their prejudice, her acts will not be void. Thus if she make a lease at will, when sole, or be lessee at will, the marriage will not determine the lease, nor can she in either case determine the lease without the consent of the husband.

b If a single woman enter into a submission to arbitration, her subsequent marriage will be a revocation. If a single woman and another person join in a submission with a third person, her marriage will revoke the submission, as it respects the whole without notice, and if an award be published after such marriage, it will not be binding, even on the person, who submitted jointly with the single woman.

c All contracts and debts between husband and wife, that were made before marriage, that were to take place presently, or might happen during the marriage, are extinguished by the marriage. A man executes a bond to his intended wife, to leave her a certain sum at his death : the bond is void, but equity will decree payment, on the idea, that it is in the nature of a promise or covenant, to leave the wife a certain sum at his death : such promises and covenants not being extinguished by the marriage, as they are to be paid in future, and are not a present debt. If the husband enter into a bond with a stranger, conditioned to leave the wife a certain sum, it will be good.

IV. Of the power which marriage gives the husband over the estate of the wife.

d As the law contemplates the husband and wife as being but one person, it allows them to have but one will, which is placed in the husband, as the fittest and ablest to provide for and govern the family ; for this reason it gives him an absolute power over her personal property ; but he does not become the absolute proprietor of her real estate. He has the power to use and improve it, and take all the profits of it during her life. He may lease it during life, but cannot make an absolute sale of it, without her consent, as she

continues

a 1. Bacon's Abridgment, 291. 5 Coke, 10. b Roll. Abr. 332.  
c 1. Bac. Abr. 291, 292. d Ibid. 1. 286.

continues to be the proprietor in fee. *c* In the first settlement of this country, the husband was considered as possessing the power of alienating the lands of his wife, without her knowledge or consent, upon the principle, that by force of the marriage, he became the absolute proprietor of all the lands she owned, at the time of the marriage, or that descended and came to her during that time. This custom originated from the consideration of the little value of lands at that early period. But a statute has been made providing, that the husband shall not alien by deed any estate of inheritance that comes to the wife, before, or during the coverture, unless her consent to such deed be expressed by her hand and seal to the deed, and acknowledged before some assistant or justice of the peace. *f* If a man marries a woman seized of an estate in fee, he gains a freehold in her right. *g* The husband, by virtue of the marriage, becomes the compleat proprietor of the chattels real of the wife, and may dispose of them as he pleases. Thus if a woman be possessed of a term for years, of ever so great extent, and marries, the husband becomes the proprietor of the whole term, and he may dispose of the whole or part, and it is liable to be extended for his debts: but if he dies without disposing of it, then it survives to the wife. He cannot devise such term by will, for that does not operate till after his decease, and of course is no disposition in his life; and then instantly at his decease the term by operation of law reverts to, and reverts in the wife. The husband may however execute a lease to take effect at his death, which shall conclude the wife.

*b* All personal estate belonging to the wife, and in her possession, at the time of the marriage, is instantly, and absolutely vested in the husband, and becomes his property. He may use, and dispose of it without her consent, and may give it away by will. In case he never disposes of it in his life time, it shall at his death go to his heirs, and not to his wife, tho she survive him. A bare possession of personal goods will not by marriage, vest them in the husband. If goods are bailed to a single woman, or she finds them, and marries, action must be brought against the husband and wife. Where the goods of a single woman are in the possession of another by trover, or bailment, and she marries, the property which continued in

C c 2

*c* Statutes 120. *f* Coke Lit. 351. *g* Co. Lit. 46. 351. *b* Ibid. 351.  
*d* Sid. 172. *h*ub. 641. Moore, 25. Vent. 261. 2 Lev. 107.

the wife, is vested in the husband ; and he alone, without his wife, may bring an action for them. <sup>k</sup> But things in action, where she has a right of action to recover them, as debts, are not absolutely vested in him : but he has right to sue for and collect the debts, and reduce them into possession, which gives him an absolute property in them : but if he fail to collect them in her life time, or to reduce the property to possession, then on her decease, such things in action shall go to her heirs, and he shall have no right only as administrator to her, but if she survive, then the same remains in her. If the husband sue an obligation, and obtain judgment and execution, and the wife dies, this is such an alteration of the debt as to reduce it in legal consideration into possession, and the husband may collect the execution; and shall have the money, For wherever the husband makes any alteration in the state of the debt, so as to exercise an act of ownership respecting it, the law deems it to be a reducing to possession. <sup>l</sup> So if the husband make a letter of attorney to a person to receive the money, on obligation due to the wife before marriage, who receives it, and the wife dies, the husband shall be entitled to the money, for by the receipt this was become a thing in possession. <sup>m</sup> The husband has the same right to the estate of the wife accruing to her during the marriage, as to that which she possessed at the time of the marriage.

V. How far the husband is chargeable with the debts of the wife, contracted before and after marriage, and of a wife who is executrix or administratrix.

The husband is bound to pay the debts of the wife contracted before marriage, whether he received any estate by her, or not ; for as her existence is consolidated into his, and he has the use and profits of her real estate during marriage and the absolute property of her personal estate, with the advantages of her labour, it is reasonable that he should pay her debts—for otherwise they must be wholly lost, which would be an injustice to her creditors, that the law will not authorise persons to accomplish by their own act. <sup>n</sup> But the debts must be collected in the life time of the wife, and if she dies, the husband is exonerated from the liability to pay them, unless a suit has been commenced, and judgment obtained.

and

<sup>k</sup> Co. Lit. 351. <sup>l</sup> Roll. Abr. 342. <sup>m</sup> Co. Lit. 351. Roll. Abr. 352.  
<sup>n</sup> Ibid. 351. Sid. 337.

and the wife die before execution be issued, or after it be issued, and before collection, then the husband is liable to pay, because the judgment has altered the debt. If the wife survive the husband, she is personally liable for all debts contracted before the marriage, which were not collected of the husband in his lifetime, or altered by a judgment against the husband and herself.

• In respect of debts contracted during marriage, it is a general rule, that the husband shall provide for the wife, all necessaries suitable to his degree, estate, or circumstances : but that she has no inherent power to bind the husband for any contract, not even for necessaries, without his assent precedent, concomitant, or subsequent, express or implied. The evidence of assent must be left to the jury to determine, and tho no express consent, or agreement be proved, yet if it appears that she cohabited with her husband, and bought necessaries for herself, children, or family, this shall be deemed sufficient evidence of an implied assent, and the husband shall be chargeable. If the wife cohabits with her husband, let her be ever so lewd, he is liable to pay for necessaries, for he took her for better or worse. If he runs away from her or turns her away, or forces her by ill usage and cruelty, to leave him, he gives her credit wherever she goes and must pay her contracts for necessaries. If a man be beyond sea, on a voyage, and the wife contracts for necessaries, this shall be good evidence of a promise to bind the husband. In these cases, the law goes upon the principle of presumptive proof of consent, which shall be sufficient, unless contradicted by positive proof. If the husband allows the wife a separate maintenance, or prohibits particular persons from trading her, he shall not be liable for her contracts, while he pays such separate maintenance, nor to the persons particularly prohibited, for in these cases, no consent, but the contrary appears : but a general warning in the gazette, or newspaper, not to trust her, will not be a sufficient prohibition. *p* But where a husband turns or forces away his wife, he is liable for her contracts for necessaries, and cannot make a particular prohibition to any person not to trust her, so as to exonerate himself from liability. *q* If a woman elopes from her husband, tho she does not go away with an adulterer, or live in an adulterous manner, every person trusts her

*a* 1 Bac. Abr. 295. *p* 2 Strange 1213. *q* Ibid. 875.

her at his peril and the husband is not liable for her contracts for necessaries. <sup>r</sup> If a woman elope from her husband, with an adulterer, or lives from her husband, in adultery, he is not liable for her contracts for necessaries. If a woman departs from her husband without his consent, and during her absence, he prohibits sundry persons and particular J. S. to trust her, and afterwards she makes a request to cohabit with him again, and he refuses to receive her, and yet J. S. sells her necessaries suitable to the degree of her husband, yet he shall not be charged : and here this distinction is made, that where the husband forces away the wife, he can make no particular prohibition ; but where the wife elopes, even tho she offers to return, yet as she was guilty of the first wrong in eloping, the husband does not lose his right to make a particular prohibition.

<sup>f</sup> A married woman that elopes from her husband, cannot be sued alone and separate from her husband, for any contract whatever ; and the only instances where a married woman can be sued alone are, where the husband has abjured the realm, or is exiled, or the like, so as to be deemed politically dead. So that if a person trusts a woman, that has eloped from her husband, he has no possible remedy for the recovery of the debt ; and the reason of the law is to prevent women from eloping, by preventing their obtaining credit even for necessaries.

When a man marries a woman that is an executrix, or administratrix, he becomes jointly concerned with her, and they must join in all matters that respect the settlement of the estate. <sup>t</sup> The husband acquires no property in the estate, the wife holds by such right, but is equally accountable with her, as tho he had been executor or administrator himself. <sup>u</sup> If the wife before her marriage shall have committed a waste, in the estate that come to her hands in such capacity, it shall be deemed a devastavit in the husband.

VI. When the husband and wife must join in suing, and be joined in being sued, and when the wife may sue, or be sued as a single woman.

<sup>r</sup> 1. Strang. 647. 706. <sup>f</sup> 2 Black. Rep. 1079. <sup>t</sup> Co. Lit. 355.  
<sup>u</sup> Cro. Car. 603. Roll. Abr. 347

1. \* It is a general rule, that in all cases where the debt or cause of action will survive to the wife, the husband and wife must join in the action, as in recovering debts due to the wife, before the marriage, in an action relating to her freehold, or estate of inheritance, or for injuries done to her person. If a bond be executed to the wife during the marriage, conditioned to pay money to the wife, the husband alone may bring an action. \* Upon an express promise to pay the wife a certain sum, she may join with the husband in the action, because it will survive, as in the case of a promise to pay the wife ten pounds, on the consideration of curing a certain wound, which was to be effected by the skill and labour of the wife : but unless there be an express promise to the wife, she cannot join, for the fruit and labour of the wife, belong to the husband ; for which he only shall bring the action. Upon trover before, and conversion after marriage, of the estate of the wife, they must join in the action. y For all injuries done to the person of the wife, as battery, false imprisonment, slander, and malicious prosecution, the husband and wife must join in the action, for the recovery of damages, and if she dies, the action dies with her. \* But for an injury done to both, as a malicious prosecution, they cannot join. The husband must bring action alone for his injury, and join the wife in an action for the injury done to her.

Where the husband for any personal tort done to the wife, sustains special damage, he may have his action alone, as in the case of a battery, carrying away, detaining, or falsely imprisoning the wife, by which he loses her comfort and company, and her service and assistance in his family. For this injury he is entitled to his action. Where the wife was administratrix or executrix, the husband must join, and they must be named as executors or administrators.

2. \* The husband is by law, responsible for all the actions for which his wife was liable, at the time of his marriage, and for all her torts and trespasses during the marriage, and the actions in such cases, must be brought jointly against them, for if she might be sued alone, it would be a method of subjecting the property of the husband without giving him an opportunity of defending himself.

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\* 2 Lev. 493. 1 Bac. Abr. 305. \* Sid. 172. y Roll. Rep. 360.  
z *Monte & wife, vs. Maples &c.* B. C. 1792. \* Co. Lit. 133.



If therefore, a man recovers against a married woman, as sole, the husband may avoid it, by writ of error. *b* If goods come to a married woman by finding, the action must be brought against the husband and wife, and the conversion laid in the husband, because she cannot convert to her own use—but as both were concerned in the trespass of taking them, the action must be brought against both. *c* If a lease for life, or years, be made to husband and wife, reserving rent, action of debt for rent may be brought against both, for this is for the advantage of the wife: *d* but assumpsit lies not against husband and wife, for a promise made by them during marriage, for as to the wife, it is void.

2. *e* By the common law of England, when a man has abjured the realm, is banished, *f* or transported, he is deemed to be dead in a civil point of view, and being disabled to sue in right of his wife, she is considered as a single woman, for it would be unreasonable that she would be without remedy, or that persons who have claims upon her, because they can have no redress against the husband, shall have none against her. *g* If a woman marries an alien enemy and he resides in a foreign country, she may be sued as a single woman.

*h* By a particular custom of the city of London, if a married woman carry on a trade, in which her husband does not intermeddle, she may be sued as a single woman. *i* In Equity, the separate estate of a married woman, living as a single woman on a separate maintenance allowed by the husband, on a separation after marriage, has been subjected to the payment of her contracts: but the general principle of law has been, that a married woman can have no legal property, and has lost all ability to contract, yet in England, since the practice of married women living absent from their husbands on separate maintenance, has become so frequent, Lord Mansfield, on the principle of extending remedies to correspond with the alterations of manners, and to furnish relief at law, as far as possible in all cases where equity relieves, has decided that a contract is binding upon a married woman, living separate from her husband, by agreement, having a large separate maintenance settled upon her, continuing notoriously to live as a single woman, and contracting and

*b* Co. Lit. 153. Roll. Abr. 6. *c* Ibid. 348. *d* Palm. 313. *e* Co. Lit. 133. *f* 1. Bac. Abr. 318 *g* Salk. 116. *h* 10 Mod. 6 *i* Pow. on Con. 77.

and getting credit as such, the husband not being liable; and that he may be sued as a single woman. Powell in his essay on contracts, strongly reprobates this decision. He contends that this principle gives the married woman the moral capacity of contracting in all respects, the same as if she were a single woman, that it militates against the first principles of the English law; and that it is blending law and equity, which tho aiming at the same end, which is justice, are distinctly administered in their respective courts, by their particular judges and rules of justice. Yet it may be said, that when the law recognized the idea of a separate estate of the wife, and a separate living from the husband, it necessarily involved the idea of a power of contracting, and being sued as a single woman.

But in this state our courts have had no occasion to take these principles into consideration, for we have not introduced the practice of separate maintenance, and living of the husband and wife. Nor is it very probable that we ever shall, as the granting of divorces, renders such separations unnecessary: and this may be considered as a strong argument in favour of the policy of our law, for these separations necessarily arise from the indissoluble nature of the marriage contract, by the English law.

VII. Of the power of the husband over the person of the wife, and her remedy for any injury done her by him.

The husband has power and dominion over the wife, as he is responsible for her actions; he may controul, restrain, and regulate her conduct, and keep her by force within the bounds of duty, and under due subordination and subjection. \* When the wife makes an undue use of her liberty, by squandering the estate of her husband, or going into lewd company, the husband may lay her under a restraint to preserve his honor and estate—but if he restrain her of her liberty unreasonably, or imprison her, she may have relief by habeas corpus. † It is an old principle of the common law, that the husband has the power of moderately chastising the wife for her misbehaviour, but that this power must be confined within reasonable bounds, and he is prohibited from using violence, for if he threatens to beat her outrageously, or uses her outrageously

outrageously, she may swear the peace against him, and he shall be required to find sureties for his good behaviour.

The practice was undoubtedly introduced in an unpolished age of society, and it is with regret that I mention it as a part of the common law, that the husband possesses the barbarous power of chastising the wife : for the peace, the security, and the happiness of domestic life, are much more dependent on the morals and the virtues of the people, than political regulations. Where refinement and purity of manners prevail, and the sentiments of the people are not corrupted and depraved by a licentious and unrestrained intercourse of the sexes, we may expect that tenderness and delicacy of sensibility which alone can produce permanent happiness in the conjugal state : but when recourse is had even to moderate chastisement, to preserve the balance of power, an everlasting farewell may be bid to all prospects of pleasure and felicity.

In this state, I have never known the question agitated with respect to the power of the husband, to chastise his wife. If such a question should ever be brought before a court, I hope they will discard the savage doctrine of the common law, and decide that a husband is punishable for the unmanly act of chastising his wife.

VIII. How far the acts of the husband, or wife alone, or jointly with the wife, will bind the wife.

" The husband has an absolute power of disposing of the chattels real, and personal estate of the wife : but of her lands he can only dispose of the use and improvement during his life, without her consent. She may join in conveying or leasing them, and the contract will be valid. " If the husband lease the lands of the wife for a longer term than his life, and she survive, the lease will be good, unless she express her dissent, by some act after the death of her husband, for if she accepts rent upon the lease, or does any act which amounts to a consent to the lease, it will be binding upon her.

• A married woman is capable of purchasing, for as this can be no disadvantage to the husband, he is supposed to assent to it ; but he may disagree and avoid the purchase. If he neither a-

grees

grees, or disagrees expressly, the law implies from such conduct, an agreement. But in case of an agreement, the wife may after his death, waive it, for having no will at the time of the contract, *she is not absolutely bound by it* : and if *she does not* after the death of the husband by some act express her agreement to the purchase, her heirs may depart from it.

IX. Of the crimes of the wife, where she alone shall be punished, and where the husband shall be responsible for what she does in a civil action.

A married woman, may be punished for any crime she commits, in the same manner as if she were single. If it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be proceeded against without him, by way of indictment, or information ; for the marriage does not protect the woman in criminal cases ; nor render it necessary to join an innocent husband in the prosecution. *p* The law so far favours the wife on account of her subjection to her husband, that if she commits a theft in company with or by the coercion of her husband, she shall not be punished, *q* and she shall not be deemed an accessory to a crime, for receiving her husband who has been guilty, tho the husband shall be, for receiving the wife. *r* She cannot be guilty of theft, in stealing the goods of her husband, from the legal consideration, that they are one person—nor can a stranger be guilty of theft in receiving the goods of the husband by the delivery of the wife. *s* But if she commit a theft of her own volition, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with or by the coercion of her husband, she is punishable as if she were single, because her obligation in such cases to obey the law, is of a higher nature, than the obligation to obey her husband. *t* The husband is not liable to pay any forfeiture, recovered on any public prosecution—but if the wife incur the forfeiture of a penal statute, the husband may be made a party to an action, or information for the same, as he may generally for any suit, or cause of action given by the wife, and shall be liable to answer for the damages recovered therein.

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CHAP.

*p* Hal. p. c. 65. Hawk. p. c. 2. *q* 3 Ins. 108. Hal. p. c. 65. 2 Hawk. 320. *r* Hawk. p. c. 93. *s* Hal. p. c. 65. Hawk. p. c. 13. *t* *Ibid.* 375. Lev. 247.

## OF PARENT AND CHILD.

**C**HILDREN are of two kinds, legitimate and illegitimate, or spurious. Legitimate are those which are born within the pale of matrimony. The law is so indulgent to the frailties of humanity, that children shall not be deemed illegitimate, if the parents will marry at any time before their birth, and therefore their being begotten out of lawful wedlock, is not the criterion, by which illegitimacy is determined, but the intermarriage of the parents subsequent to the birth of a child, will not render such child legitimate.

Illegitimate children, commonly called bastards, are such as are born as well as begotten out the state of lawful wedlock. I shall treat of each kind of children, and,

I. Of the reciprocal rights and duties, subsisting between parents and children, who are legitimate.—The duties of parents consist in affording their children maintenance, protection and education. These duties are all founded in nature, and result from that ardent affection towards their offspring, which is implanted in the bosom of parents. The duty of maintenance, consists in making provision of necessaries for the support of children, and is incumbent on all parents who possess a sufficiency of estate, during the infancy or nonage of their children. Parents are not bound to provide for their children after they become of full age, in case they are able to provide for themselves, but if they are not, then the statute has pointed out their duty, \* which enacts, that when it shall happen, that any person, or persons, shall be naturally wanting of understanding, so as to be incapable to provide for themselves, or by the providence of God, shall fall into distraction, and become non compos mentis, or shall by age, sickness, or otherwise become poor and impotent, and unable to provide for themselves, and have no estate, with which they can be supported and maintained, then they shall be taken care of and supported by such relations as stand in the line or degree of father and mother, grandfather and grand-mother, children and grand-children, if they

are

\* Statute.

are of sufficient ability, which is to be done by order of the county court, where such persons are, upon application of the selectmen of the town, or any one or more of such relations.

The duty of protection, is founded in the nature of the connexion between parent and child, and is enforced by the strongest principles. The parent is the natural guardian of the child and may aid, assist, and uphold him in lawsuits, without being guilty of maintenance, he may justify an assault and battery, in defence of his children, and so indulgent has the law been to parental affection, that where a man's son was beaten by another boy, and the father to revenge the quarrel of the son, went near a mile and beat the other boy so much that he died, this was called manslaughter only, and not murder,

The duty of parents to furnish their children with proper education is left by our law, very much to their own consciences.— Education is undoubtedly an object of the highest consequence to civil society, but it is better generally to leave it to the natural bent of the human mind, for all political regulations will tend to limit and shackle the exertions of genius, and prevent that gradual improvement to which the intellectual faculties are always progressing. The legislature therefore have left the higher branches of education to the discretion of the people, and have only made provision for a sufficient degree of learning to prevent their sinking into barbarity, and to lay the foundation for more important improvements. The law requires, that all parents and masters of children, shall by themselves or others, teach and instruct all children under their care and government, according to their ability, to read the English tongue well, and to know the law against capital offences, and if unable to do this, to learn them the first principles of religion.

It is the duty of all parents and masters, to employ their children and apprentices in labour, so as to prevent their living in idleness, and all children are to be brought up in some honest and lawful calling, and employment.

The power of parents over their children, is calculated to enable

able them to perform their duty and keep their children in obedience and subjection. The parent may restrain and controul the actions of his children, and may correct and chastise them while under age, in a reasonable and moderate manner. The consent of parents must be obtained by minors to their marriage. The father has no power over the estate of the child, only as guardian and trustee. He may receive the profits, during the minority of the child, but must account for them when he arrives of full age. The parent is entitled to the benefit of the labour of the child during minority. The period when children arrive to full age, are capable of acting for themselves, and are liberated from the government of their parents, is at the age of twenty-one years, being the same, both for males and females.

The duties of children to parents, are obedience and subjection during their minority, and honor, reverence, and respect during their lives. As they depended on the assistance and protection of their parents, during the feeble and defenceless period of infancy, so when their parents are reduced to a state of infirmity, by old age, it becomes the duty of children to yield the same assistance and protection. The statute law has therefore imposed upon children the same obligation to support their parents when reduced to want, as upon parents to support their children, under like circumstances; but sons by marriage are not liable to contribute to the support of the parents of their wives.

“ By the Roman law, parents had much greater power over their children, than by our law. By a law in the twelve tables, fathers had the power of life and death over their children, and might sell them. This law however was moderated in the progress of improvement: but still the parental power was very extensive. \* The children could acquire no property only for the benefit of their parents, and they were liberated from paternal government only by the death of their parents. The paternal authority, extended even to grand-children, and a system of domestic despotism seems to have been established by law, repugnant to the happiness and destructive of the rights of mankind.

## II. Of illegitimate children, or bastards, and we shall consider

“ Justinian's Institutes, l. i. tit. 9.    \* Cod. 8. tit. 47.

sider, 1. Who are bastards. It has already been remarked, that bastards are children, begotten and born out of lawful wedlock. 7 By our law, the intermarriage of the parents will not render the issue previously born legitimate: but by the Roman and canon law, such subsequent marriage would legitimate the issue previously born. \* All children born so long after the death of the husband, that by the ordinary course of nature, they could not have been begotten by him are bastards. But as this is a matter of some uncertainty, as various accidents may retard, or accelerate the birth, the law has not exactly ascertained the time. The usual time of gestation, is allowed to be nine solar months and ten days: but a child that was born nine months and twenty days after the death of the husband, was allowed to be legitimate. A child born eleven months after the death of the husband, and it being proved that he was incapable of enjoying her within a month before his death, was adjudged a bastard. \* A lewd woman after her husband's death, married her adulterer, and within six months and one day, after her husband's death had a child. It was adjudged to belong to the first husband, because he had the dominion of the woman, at the time of the conception. b A wife married immediately after the death of her husband, and had a child within nine months and eleven days after the death of her first husband. It was adjudged to belong to the second husband, because born one day after the usual time, which is the only measure to discern between them. c But if the child be born at the end of the nine months and ten days, so as to render it doubtful to which husband it belongs, it is said, that the child may chuse his father, when arrived to the years of discretion. To prevent this dispute, the Roman law ordained, that no widow should marry within ten months after the death of her husband, and by a law in England, before the conquest, if a widow married within ten months after the death of her husband, she forfeited her dower.

d By the common law of England, when a man dies leaving no children, and the wife says she is with child, the heir at law may have a writ to inspect her, for the purpose of preventing her from imposing upon him, by a supposititious heir to the estate.

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7 1 Black. Com. 456. \* Rol. Abr. 356. \* Palm. 9. b Rol. Abr. 347. c Ca. Lit. 8. d Ibid.



The sheriff is to impanel a jury of matrons, and if on inspection, they return that she is pregnant, then she is to be kept under proper restraint, till delivered. But in this state there has hitherto been no occasion to adopt this law.

Bastards may be begotten, and born during lawful marriage. If the husband be under the age of fourteen, or incapable by reason of some corporal imbecility to beget children, the issue of the wife are bastards. It is a general rule, that all children born in lawful wedlock, shall be deemed legitimate, and the access of the husband, is to be presumed in favour of legitimacy : *f* but in all cases where it can be proved, that the husband had no access, the children are bastards—It is immaterial whether the husband be within or without the empire, but the proof must be clear, otherwise access will be presumed.

2. We consider how bastard children are to be maintained.—The only duty which the law enjoins on parents towards their illegitimate offspring, is that of maintenance. The father of a bastard child, possesses over him no power and authority, and the child is bound to yield him no obedience. On this account, a statute has been made, pointing out the mode of ascertaining the reputed fathers of bastards and the mode of their maintenance. *g* The statute concerning bastards and bastardy, enacts, that he who is accused by any woman, to be the father of a bastard child begotten of her body, the continuing constant in such accusation, (being examined on oath, and put to the discovery of the truth in the time of her travail,) shall be adjudged the reputed father of such child, notwithstanding his denial thereof, and shall stand charged with the maintenance thereof, with the assistance of the mother, as the county court in which such child is born, shall order, and give security to perform such order, and also to save the town or place where such child is born, free from charge for its maintenance : and the said court may commit to prison such reputed father, until he find sureties for the same. Unless the proofs, evidences, and pleas, made and produced on the part and behalf of the man accused as aforesaid, and other circumstances be such, as the court who have cognizance of the same, shall see reason to judge him innocent and

and acquit him thereof, in which case, they shall and may otherwise dispose of the same.

And every assistant or justice of the peace, (upon his discretion,) may bind to the county court, him that is charged with the begetting of such bastard child, and if the woman be not then delivered, the said county court may order the continuance, or renewal of his bond, that he may be forthcoming when such child is born.

This statute, by admitting the oath of the woman to prove the father of a bastard child, introduces a new mode of proof, which is repugnant to the general rule respecting evidence; and tho attended with inconveniences, is justifiable from the nature and necessity of the case. It is for the interest of the community, that some method be adopted to ascertain the father of such children, for the purpose of compelling him to furnish maintenance, and to relieve the towns where they are born, from such burden. From the nature of the thing, it is impossible for any person to know the father of a bastard child, but the mother, and unless she be admitted as a legal witness, the father could never be discovered, all bastards would become a public expense, and this would operate as an additional inducement to a practice to which mankind are now impelled, by a propensity that deserves to be checked and not to be strengthened. On this principle then, the statute has introduced the best mode of proof which the nature of the case will admit. The testimony of the woman extends no further than to establish the fact, that the person accused, is the reputed father of the child, so that he becomes chargeable with its maintenance. In legal consideration, it fixes on him no crime, and exposes him to no punishment. But as this mode of proof, gives great advantage to a woman, and seems to be a hardship on persons accused, the law has guarded it in the most effectual manner possible. The woman must be constant in her accusation, and uniform in her story. If she accuses different persons at different times, no credit is to be paid to her testimony. She must be put to the discovery in the time of her travail. At that critical period of danger and distress, it is supposed that few women possess firmness and wickedness enough to accuse a man falsely. The statute therefore, has made this

measure absolutely necessary, to enable a woman to support this charge against the man she accuses. The omission of this requisite, can be supplied by no other proof; for where a person intends to take benefit of a statute, he must comply with every requisite of it. The oath of the woman accompanied with a compliance with the law, is what is called statute proof, and has so generally been considered as sufficient evidence to convict a person accused, that the certainty of conviction when a person is accused, has become a proverbial expression. It is unquestionably true, that the oath of a woman must prevail against the denial of the person accused, and that it devolves on him the burden of manifesting his innocence. The true point of light, in which we are to consider this matter is, to allow the oath of the woman, to be admissible and legal evidence, and then to give the man accused the privilege of counter-acting, invalidating, and destroying her testimony, in the same manner as is permitted in other cases. This is clearly warranted by the statute, which authorises the court to acquit a man, when he exhibits proof sufficient to satisfy them of his innocence.

The testimony of the woman, ought to be corroborated by those circumstances which usually attend such transactions, and which are the best guide to truth. If she stand single in her story, unsupported by such collateral circumstances, she is to be distrusted. If the man accused can shew it to be impossible that he is the father of the child, by proving that he was in some other place at the time she accuses him of the fact, or that by some corporal imbecility, he was incapable of procreation, he must be acquitted. Indeed it may be laid down as a general rule, that if the man accused bring proof of such circumstances, as satisfy the court of his innocence, such as a criminal connexion with another man, they may acquit him. Merely the proof of a want of veracity and chastity, may not be sufficient, but those combined with other circumstances, are to be taken into consideration. For it is much to be suspected that a woman of notorious lewdness and wickedness, will accuse an innocent person, for the purpose of screening the guilty, or to gratify malice and revenge.

The statute requires an examination of the woman on oath, but  
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this may be before or after the birth of the child. It is the usual practice for a woman, when she discovers herself pregnant with a bastard child, to make complaint to a justice of the peace, who issues his warrant, and the person accused is brought before him for the purpose of holding an enquiry. Such single minister of justice may at discretion bind such person to appear at the next county court, and for the purpose of exercising his discretion, some enquiry must be had—but the authority is bound in duty to recognize the person to the county court, unless the prosecution appear to be wholly groundless, and without any colour of probability. But a prosecution may be commenced by the woman after the birth of the child, in case she conformed to the statute as to accusation at the time of delivery. Within what time however, after the birth of the child, the prosecution shall be commenced, or be foreclosed, has not been determined.

It is provided by the statute, that where the woman omits to bring forward a suit, to recover maintenance, and no sufficient security is offered to save the town from expence, for the support of bastard children; the selectmen may institute a suit in behalf of the town, to recover maintenance of the person accused: and may take up and pursue a suit began by the mother of the child for maintenance thereof, in case she fail to prosecute to final judgment. *b* If a woman has a bastard child, and marries before a recovery is had, her husband cannot join with her in a prosecution for the maintenance, because he is not compellable by law to support such child. *i* But where in such case, the woman being dead, the county court admitted her deposition, taken before any process was commenced, and also the justice before whom she had sworn the child, to testify what she then said, judgment was reversed by the superior court, because such evidence was not admissible. *k* But the deposition of the woman in a prosecution in her name, where she was unable to attend the court in person, by reason of sickness the same being legally taken, has been admitted and considered as sufficient evidence for a conviction.

In England there is a process to compel a woman to filiate a bastard child, that is, to make known the father; but we have

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*b* Baldwin and wife, vs. Cheseborough, Supr C. 1790.  
Hobby &c. S. C. 1790.

*i* M'Donald vs. Whitney, vs. Putnam.

no such process, and the mother cannot be compelled to discover the man, with whom she has been criminally connected. This defect of our law, has however in some measure been supplied by the practice of some midwives—who in cases, where a private settlement had been made, and the women were anxious to conceal the name of the person, have refused to yield them any assistance until they discovered the names of their paramours. But the law will not authorise a midwife to refuse her assistance to a woman in travail, for the purpose of compelling her to disclose a secret: and when a midwife is employed and refuses assistance, for such purpose, action would lie against her for such a neglect of duty and violation of humanity.

3. The only legal disability to which a bastard is subjected, is that he is incapable of inheriting, being sometimes called the son of nobody, and sometimes the son of the people. This is the only disability, which a bastard, upon the principles of reason and justice can be made to suffer, because he cannot be responsible and ought not to be punished for the crimes of his parents. But as he cannot come within the legal description of an heir, on account of the uncertainty of his father, he must be excluded from this privilege. A bastard is capable of gaining a name by reputation.

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## CHAPTER SEVENTH.

### OF GUARDIAN AND WARD.

**T**HE father is considered as the natural guardian to his children, and during their minority has the care of such estate as they may have, and is accountable for the profits to the children, when they arrive to full age, but the common understanding of guardian, is where the father is dead, and the guardian is substituted in his stead and succeeds to all the powers and duties of the parent. In the investigation of this subject, I shall consider, 1. The ages of minors and wards, for different purposes. 2. The appointment of guardians. 3. Their power and duty. 4. The capacity of minors to contract. 5. Their liability for acts done by them. 6. The mode in which they must sue and be sued.

#### 1. Persons

1. Persons within the age of twenty-one, are, in the language of the law denominated infants, but in common speech, minors.—Those who are under the government of guardians, are called wards. / By statute, males at the age of fourteen and females at the age of twelve, are capable to chuse guardians, = and by common law may consent or disagree to marriage, being then arrived at years of maturity or discretion, which is called the age of puberty. By the statute law, at seventeen years of age, both sexes are under a capacity to dispose of their personal estate by will. By common law, at the same age, a male may be an executor, and a female an executrix. By the statute law, at twenty-one, they become of full age, are liberated from parental power and become free, which is completed on the day proceeding the birth-day. = By the Roman law, persons having no fathers, are under the control of tutors till they are fourteen, and curators till they are twenty-five : which is the age in all cases, when they are of full age, so as to be capable of contracting.

2. • Guardians are appointed by the courts of probate, to minors under the age of fourteen. Minors of the age of fourteen have a right to chuse their guardians, who are to be allowed by the courts of probate. When there are minors of age to chuse guardians, who have neither parents, guardians, or masters, the judges of courts of probate, in whose district they live or reside, must notify them to appear, and elect guardians, which such courts may allow of—In case of neglect or refusal, such judges may appoint guardians, with the same powers as if elected by such minors. The judges of probate, on allowing or appointing guardians, must take sufficient security for the faithful discharge of the trust according to law, and render their account to the judge, or the minor, when he arrives at full age, or such other time, as said court of probate upon complaint to them made, shall see cause to appoint.

p It has been adjudged, that where a guardian is appointed to a minor by the court of probate, under the age of chusing one, he is in judgment of law, guardian till the minor arrive at full age, unless the guardian be removed from office, or another be chosen after the minor is of sufficient age, or unless the guardian be appointed with exprels limitation of time.

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/ Statutes, 3. = 1 Black. Com. 463. = Justinian's Institute. Digest 1. 4. tit. 4. • Statutes 93, 94. p Kirb. 287.

3. The guardian being considered as a substitute for the father, the consequence is, that the power and duty of guardian and ward, in a great measure correspond to that of parent and child. The guardian is intrusted with the care of the person and estate of the minor. He has power to do every act that is necessary for the use and improvement of the estate, and may execute leases of lands.

7 Where one or more joint-tenants, or tenants in common, are minors, the guardians with the assistance of such persons as the courts of probate shall appoint, are empowered to make partition with the other tenants, which shall be conclusive upon the minors, their heirs and assigns. When a minor is interested in a mortgaged or other real estate, which in equity ought to be conveyed to any other person, the court having cognizance may enjoin the guardian under a suitable penalty, and the guardian is authorized to make a conveyance in behalf of the minor, that shall be effectual in law, and if there be no guardian at the time of bringing the suit, the court may appoint one, with full power.

It is the duty of the guardian to take reasonable and prudent care of the estate of the ward, and to use and improve it in the most advantageous manner. / But he cannot maintain an action in his own name, for any injury done to the land of his ward, such action must be in the name of the ward.

When the ward arrives at full age, the guardian must account for the rents and profits of the estate, and shall be allowed a reasonable compensation for his expense and trouble. He must answer for all damages arising by his misconduct and neglect. Whenever a guardian is appointed, the court of probate take bonds for a faithful discharge of the trust, and if the guardian misbehave, and there be danger that he will injure or waste the estate, the court on complaint, may put the bond in suit at any time, and call the guardian to account, which seems to be the proper mode for minors to call on their guardians to account during their minority: but at common law, a minor may institute a suit against his guardian under such circumstances, by his next friend. When the minor arrives at full age, and the guardian neglects to account, the bond may be put in suit, or an action of account at common law, may be brought.

7 Statute 115. r. Ibid. 48, 49. f. Eastman; vs. Camp, S. C. 1790. <sup>4 In</sup>

4. In respect of the capacity of minors to contract, the general rule is, that minors have the power of making contracts for their benefit, which are voidable by their own act ; but that they can never make a contract to their disadvantage, that is obligatory upon them, for such contracts are void. <sup>i</sup> If a minor makes a contract for his benefit, that is by which he acquires something, as a purchase of lands, or any personal property, or where there is a semblance of benefit, he may at full age dissent to the contract and avoid it, or affirm it and render it obligatory : but when he has once made a contract to his benefit, he cannot dissent to it, till he becomes of full age : because this would be an act in the nature of a contract, that operates to his disadvantage. Therefore a minor cannot execute a release, or discharge of a beneficial contract, without receiving an adequate consideration. Thus, if a minor holds a note against a man, and executes to him a discharge, the promisor cannot take advantage of the discharge, but must shew that he has paid the sum due on the note, or he shall be holden. A receipt under the hand of the minor, shall not be evidence of the payment of money on a note or other debt, if the minor denies the reception of it ; but the party must make absolute proof of the payment of money to avoid the note ; for it is clearly correspondent to reason and justice, that the payment of a debt, or sum of money due by contract to a minor, shall discharge the debt, because the reception of the money, is in the nature of a contract to his benefit, and if the contract be obligatory, an actual performance must be effectual to discharge it.

A minor cannot make a contract to his disadvantage, or without an apparent benefit, or semblance of benefit, that will be obligatory, but the same is absolutely void. He cannot execute a deed of his lands, or transfer his personal property. He cannot obligate himself by simple contract, or specialty. <sup>u</sup> But tho the contract be not binding on the minor, yet it shall be on the person of full age contracting with a minor ; for the law respecting the contracts of minors is intended to protect and secure them against fraud and imposition, and is calculated solely for their benefit. <sup>w</sup> Therefore if one deliver goods to a minor upon a contract, knowing him to

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be a minor, he shall not be chargeable in trover, or any other action for them; for the contract being void as to the minor, the delivery shall be considered as a gift to him.

„ If a minor gives a note, and when he arrives to full age, acknowledges it to be justly due, and promises to pay it, the note becomes obligatory, and if he pleads infancy in bar, it may be avoided by such special matter.

„ But to these general rules, there are some exceptions. The acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding; as if he be an executor, as he may be when seventeen years of age, by statute; all the acts which he does in performance of that trust, are binding.

An act done by an infant, which was right to be done, and which he was compellable by law to do, is obligatory: as if an infant mortgagee, on payment of the money due by the mortgagor, reconvey, the deed is valid, and cannot be avoided: because by law he might have been compelled to have reconveyed. Lord Mansfield says, that this privilege is given to minors as a shield and not as a sword, and that therefore it shall never be turned into an offensive weapon of fraud and injustice.

„ By the common law, a minor can bind himself by his contract for necessaries, for diet apparel, education, and lodging. „ But the statute law of this state, supercedes the common law, and provides that no person under the care of a parent, guardian or master, shall be capable to make any contract, which in the law shall be accounted valid, unless authorised or allowed so to contract, or bargain, by the parent, guardian, or master, and that in such case, the parent, guardian or master, shall be bound thereby. The action must be brought on the contract directly against the parent, guardian, or master, as tho made by them for their benefit. What shall be deemed an authorising, or allowing to contract, so as to bind the parent, or guardian, is not expressly mentioned. „ It has been adjudged by the superior court, that a general licence by the guardian, to the minor to trade, shall render the contracts of the minor

„ *Lawrence vs. Gardener*, S. C. 1792. 3 Burr. 1802. 2 *Powel*. 34.  
 „ *Statutes* 142. *Kirb.* 286. 4 *Spring vs. Evans* S. C. 1795.

minor obligatory on the guardian. If a minor have neither parent, guardian, or master, he cannot come within the description of the statute, and of course will possess by common law, the power of making contracts for necessities; and this seems to be a reasonable construction of the law, for where a minor has no person to provide for him, he must have the power of contracting for the necessities of life, but if he have some person to superintend him, there is no necessity that he should be capable to make any contract for his support.

5. Minors are responsible for all acts that are called torts or trespasses, whenever they are capable to commit them, but not for any acts that are in the nature of contracts. If a minor affirming himself to be of age, borrow a sum of money, and execute his bond for it, he may avoid it by reason of nonage; and no action lies for the deceit; for tho' responsible for actual torts, as trespasses with force, yet he cannot be for those that sound in deceit; for if they should, all minors might be ruined: to avoid which they are incapacitated to make contracts, and if they might be sued for a deceit in contracts, they would be exposed to the same danger, as to be liable for their contracts.

So if a minor on the sale of a horse affirm it to be his own, when it belongs to another, yet on action brought for the deceit, if the minor plead infancy, he shall not be liable: because the contract being voidable, the plea of infancy avoids it, and it is in the nature of an affirmation, by a minor that he is of full age. If a minor goes about town and pretending to be of age, defrauds by taking up goods upon credit, and then pleads nonage, the person injured cannot recover back the goods, or the value, yet he may be punished as a common cheat. Minors are no more liable in equity than at law, for frauds and deceits in contracts.

Minors on account of their youth and inexperience, are deemed incapable to prosecute and defend in suits. The law therefore to protect them from any injury in this respect, has made it necessary that they sue by guardian, or if they have none, then by the next friend. The parent is called the natural guardian. They cannot be sued only under the protection of, and by joining the guardian,

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• Sid. 258. 3. Bac. Abr. 132. d Kcb. 778, • Geer vs. Hovey, 8.  
C. 1790. f Rol. Abr. 287, 288.

parent, or master, in the suit ; if they have none, they may be sued without, but the plaintiff must inform the court, whose duty it will then be to appoint a guardian, for the purpose of assisting them in their defence. § If judgment be rendered against a minor, no guardian being cited or appointed by the court, on default, writ of error will lie for the error in fact, and the judgment be reversed.

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CHAPTER EIGHTH.

OF MASTER AND SERVANT.

A Servant, is a person subjected to the power and authority of a master for a limited time, upon a particular contract. In discussing this subject, I shall consider, I. Who may be servants. II. The power of masters, and the remedy of servants against their master for injuries, and III. The liability of masters for the acts of their servants,—and of servants for their own acts.

I. Servants are of several descriptions.

1. Menial servants or domestics, who are not however particularly recognized by law, and are so denominated from the nature of their employment. The right of the master to their services in every respect, is grounded on the contract between them. Labourers, or persons hired by the days work, or any longer time, are not by our law, or in common speech considered as servants.

2. Poor debtors may by law be assigned in service, for the payment of their debts, and rendered servants : and for this purpose the law provides, <sup>b</sup> that when a debtor is imprisoned, and no means can be found to pay the debt, except by service, then if the creditor desire it, and the court judge it reasonable, the superior or county court, shall have power to order and dispose of such debtor in service for the purpose aforesaid, to some inhabitant of this state, whether the execution by which he is held, issued from such court or not. Provided, that such court must be satisfied by the oath of the parties, that such debtor has not sufficient estate to pay such execution,

§ Kirb. 216.    <sup>b</sup> Statutes, 9, 10.

execution, excepting necessities exempted by law, from execution, and that the debt is really due on good consideration.

The assignment of a debtor in service to pay his debts, is wholly in the discretion of the court. As the restraint of natural liberty, and the subjection of one man to another, is a matter that in many instances, is justifiable, for the purpose of compelling a debtor to discharge his debts: and in some instances may be hard and unjust, it would have been better, had the law more expressly defined the cases in which debtors shall be assigned in service, and not have left it wholly to the discretion of a court.—For where the most valuable rights of man are concerned, we ought to know precisely the tenure by which we hold them, and not depend upon the whim and caprice of a judge, who may doom us to servitude, in cases where we had no reason to expect it. But courts may by a proper train of decisions establish such a construction of this statute, as to make known with certainty, the circumstances under which we may be deprived of our liberty, and reduced to servitude by the judgment of law. In the case of a dishonest debtor, there is the greatest propriety in compelling him to pay his debts by service, for the purpose of punishing him and holding him up as a public example. So where, from the character and rank of a man in life, labour is a proper business, he cannot complain of injustice to be compelled to work to pay his debts. But where a man has lived in affluence, and by some unforeseen misfortune and unexpected accident, is reduced to poverty, it would be cruel to aggravate his wretchedness, by subjecting him to servitude. Between these extremes, there are a great variety of grades in which courts must exercise a discretion tempered with humanity, in designating the proper objects of this law. A debtor cannot be assigned in service, to a man and his assigns.

3. Children may be bound out in service by their parents, till they arrive to the age of twenty-one, which is frequently done by parents, who are unable to provide for their support. So the children of poor persons, supported by the town, that are suffered to live in idleness, the children of parents, that cannot provide for them, and children who have none to take care of them, the selectmen and civil authority may bind out as apprentices or servants, males till the age of twenty-one, and females till eighteen.

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Where parents or masters neglect to bring up children and apprentices in some honest calling, the selectmen and civil authority, may take them away, and bind them to other masters.

4. Apprentices are minors, who are bound by their parents, guardians, or the selectmen, by indentures, to some persons for a term of years, that cannot exceed the age of twenty one, for the purpose of being maintained and instructed by their masters, in the art and mystery which they profess. Our law has limited no time which apprentices shall serve to learn a trade, in consequence of which the community are greatly injured by unskilful mechanics. Perhaps the limitation of service for a time, suitable to learn each trade, might answer a valuable purpose, and furnish the public with good mechanics, without exposing individuals to the inconvenience experienced in England, where the law requiring an apprenticeship of seven years, for every trade, has become a subject of great complaint : because there are many trades which can be easily learned in a much shorter period.

5. Negro or molatto children, born of slaves, after the first day of March, 1784, may be held in servitude till they arrive to the age of twenty-five years, and then they shall be free. This law has laid the foundation of the gradual abolition of slavery, for as the children of slaves are born free, being servants only till twenty-five years of age, the consequence is, that as soon as the slaves now in being shall become extinct, slavery will cease, as the importation of slaves in future is prohibited. The masters of such negro and molatto children, free at twenty-five, have the same power over them as they have over their own : but over their children the masters will have no power. As slavery is gradually abolishing, and will in a short time be extirpated, there being few slaves in this state it will be unnecessary in this place to make any remarks upon a subject that has so warmly engaged the attention of the humane and benevolent part of mankind in the present age. When I treat of the offences of importing slaves and transporting negroes that are free, I shall enter into an historical detail of the progress and termination of slavery, for the purpose of furnishing posterity with all necessary information respecting a practice, which has so long been a dishonor to human nature.

II. Of

II. Of the power of masters, and the remedy of servants for injuries done them by their masters.

A master may reasonably and moderately correct, and chastise his servant for negligence, and misbehaviour. He is entitled to the benefit of his labor and service, and if a servant run away from his master, and be employed by another, the master is entitled to his wages, and can recover them by action. A master may maintain an action against another for beating and maiming his servant : but he must assign the loss of service, as the ground of his action ; which must be proved on the trial, or he cannot recover, the servant himself being entitled to an action to recover damages for the battery. A master may justify an assault in defence of the servant, and the servant in defence of his master, on the ground of their reciprocal rights and duties. An action lies in favor of the master against a person for enticing his servant from his service, or for hiring and retaining him in case he knew that he was a servant ; but if such person be ignorant of the fact, no action lies, unless he afterwards refuse to restore him, upon information and demand. Where a person takes a servant forcibly from actual service, trespass will lie in favour of the master.

It is provided by statute, that if servants or apprentices above fifteen years of age, withdraw or abscond from the service of their masters, before their covenants or terms of service are expired, they shall serve their masters threefold the time of their absence. When servants or apprentices run away from their masters, it is lawful for the next assistant or justice of the peace, or constable, and two chief inhabitants, in a town, where there is no assistant or justice of the peace, to press men and boats (if occasion be) at the masters request and charge, to pursue such servants and apprentices by sea and land, and to bring them back by force. When children, or servants upon complaint made, are convicted of stubborn and rebellious carriage, against their parents or masters, before any two assistants or justices of the peace, they may be committed to the house of correction, to remain under hard labor, and severe punishment, at the discretion of the court, who on reformation may order their release, and their return to the parents or masters.

If any servant or apprentice flee from the tyranny and cruelty of his master, to the house of any inhabitant of the same town wherein they belong, they shall be protected, and sustained, till due order be taken for their relief. Due notice must forthwith be given to the master, and to the next assistant or justice of the peace, who shall cause said master and servant, or apprentice, to come before him, and reconcile them if he can ; but if he cannot, then he may according to his discretion bind over the master to the next county court, and also the servant or apprentice, or give orders for their safe custody and appearance before said court ; which court on hearing the matter, may upon default found in the master, discharge the servant or apprentice from his indenture or service ; and if default be found in the servant or apprentice, may inflict a discretionary punishment.

Where the servant or apprentice are too young, or too much overcome by fear, to fly from the cruelty of a master, the law has made no provision for their relief, and the master can only be punished at common law, for a breach of the peace, in chastising unreasonably and immoderately. Perhaps in the improvement of society, it will be discovered that the power of parents and masters, ought further to be restrained and controuled, and that cruelty towards children in those tender years, when they are incapable of defence, shall be punished in such manner as to secure to them mild and humane treatment in all cases. In domestic government nothing can be more prejudicial in forming the manners of youth, than the severity and rigour too often exercised in the corporal punishment of children. A system of education founded upon the principles of a mild government, and generous treatment of children, can alone improve and cherish those virtues, which so essentially contribute to the welfare of the community.

III. Of the liability of masters for the acts of their servants, and of servants for their own acts.

\* The master is answerable for every act of the servant done by his command, either expressly given, or implied, / for he who does an act by another, does it in legal consideration by himself. Therefore if a servant commit a trespass by the command

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\* 1 Black. Com. 429, 430. / Qui facit per alium, facit per se.

or encouragement of his master, the master shall be deemed guilty of it, as well as the servant, for he is bound to obey only the lawful commands of his master : but a recovery against one will excuse the other, because a man can have but one satisfaction for a trespass. If an innkeeper's servant rob, or steal from, or do any injury to the property of his guest, the master is bound to make restitution : for in all such cases there is necessarily a confidence reposed in the innkeeper, that he will provide faithful servants. This negligence is therefore construed into an implied consent to the injury. = For he who does not prohibit the doing of a thing when it is in his power, consents to and commands it. If the servant, or drawer at a tavern, sells a man bad wine, or bad liquor of any kind, by which his health is injured, action lies against the master ; for the permitting the servant to sell bad liquors, tho without express order to sell to any particular person, implies a general command.

\* The master is answerable for whatever he permits the servant to do in the usual course of his business, for this is considered as amounting to a general command. A wife, friend, or relation, that commonly transact business for a man, are for this purpose, his servants, and he is accountable for their conduct. If I pay money to the servant, wife, friend, or relation, in the usual course of business intrusted to them, and they embezzle it, I am not accountable for it ; but if it be not in the usual course of their business, I must answer for it, if they fail to pay it over to the master. For in the first instance, the law implies a confidence, and general command, but in the last no such understanding of the master can be presumed. If I usually deal with a tradesman and constantly pay him ready money, I am not responsible for what my servant takes up on trust : for here is no implied order to the tradesman, to trust my servant ; but if I usually send him on trust, or sometimes on trust, and sometimes with ready money, I am answerable for all he takes up, for it is impossible for the tradesman to distinguish when he comes by my order, or when by his own authority.

\* The master is responsible for all the damages that strangers sustain, for any negligence, or misconduct of the servant, while he is actually employed in the business and service of the master. If  
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= Nam qui non prohibet cum prohibere possit, jubet.  
430. • Ibid. 431.

= 1 Black. Com.



the servant of a smith lames a horse while he is shoeing him, then an action lies against the master and, not against the servant. But if the servant be not employed in the service of the master, then he must answer for his own misconduct. A master is chargeable if any of the family lay, or cast any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of the people, for the master has the charge of the household, and must answer for his domestics.

If a master command his servant to do what is lawful, and he misbehave himself, or do more, the master shall not answer for the servant, but the servant for himself, for that was his own act, otherwise it would be in the power of every servant, to subject his master to what actions and penalties he pleased.

A servant is under an obligation to his master, to perform his duty with diligence and fidelity. He is not therefore accountable for any damage that happens to the master in the course of business intrusted to him, through inevitable accident, but he is accountable for his own negligence and misconduct. A servant or an apprentice may be guilty of theft in taking away the goods of the master, tho under their immediate care : but if a man deliver goods to his servant, to keep or carry for him, and he carries them away with an intent to steal, it is not considered as theft, but a breach of trust, and the servant is responsible for that as well as all other injuries to the property of the master.

## CHAPTER NINTH.

### OF CORPORATIONS.

CORPORATIONS are instituted to answer certain civil purposes. The mortality of man, rendered it impracticable to invest certain rights in them, for the purpose of preserving that perpetual duration which in some instances, is essentially beneficial to civil society. On this account corporations have been formed and composed of individuals, in whom certain rights, powers and privileges have been invested, and by a constant supply and admission of

of new members, the perpetual continuance has been secured, and a legal immortality established.

Corporations are called aggregate and sole. An aggregate corporation consists in a number of persons united together in one society, and are kept up by a perpetual succession of members, so as to continue forever.

A sole corporation consists of one person only, and his successors, in some particular station, who are incorporated to give them that perpetuity, which as natural persons they could not possess. I know however, of no corporation of this description in this state.

Corporations are divided into civil and ecclesiastical. Civil are instituted, and calculated merely for temporal purposes.—And ecclesiastical, respect the concerns and interest of religion.

This state is one corporation. The counties, towns, and cities, are inferior corporations of a civil nature. The societies are ecclesiastical corporations: private corporations, are Yale-college, the society of physicians, and the banks of Hartford and New-London. In discussing this subject, I shall consider I. How corporations can be created. II. Their power, capacities, and incapacities. And III. How they can be dissolved.

I. Corporations can be created only by act of assembly. This power has been frequently exercised of late years in establishing new counties, towns, and societies. They have incorporated a society of physicians, for the purpose of diffusing medical knowledge, and they have established banks to extend the benefits of commerce. The assembly have the power of creating such corporations as they think proper, and to invest them with such power, and privileges as will correspond with the design of the institution. And such corporations must depend upon the act of creation, for their rule of conduct. Individuals can by no association, agreement, or combination, constitute a corporation. They may form companies or partnerships, under certain names, by which they can make joint contracts, and employ their influence and property, in enlarging the sphere of enterprise and activity: but they can never acquire that legal succession of members and perpetual duration that distinguish corporations.

## II. Of the powers, capacities, and incapacities of corporations.

Corporations depend for their special powers upon the act of incorporation, but there are certain incidents that necessarily appertain to corporations from the nature of the institution. They must have a name, by which they are known and called, by which they sue and are sued, and by which they do all legal acts. In consequence of which, they are considered as a collection of individuals combined into a single capacity. They have only an ideal existence, and in contemplation of law. Of course a great variety of corporations may be composed of the same persons, with perfect consistency, all which are capable of suing each other. Thus a town is one corporation, a society within the limits of it, is another, and in a suit between them, the same persons may be plaintiffs and defendants, in different capacities. The privileges of corporations are to have perpetual succession. In all private corporations, of course they have the power of electing new members; as the old ones go off. To sue, or be sued, implead, or be impleaded, grant, or receive by its corporate name, and do all other acts as natural persons may. To purchase lands, and hold them for the benefit of their successors, and to acquire personal estate. To make bye laws, or private statutes, for the government of the corporation, which are binding upon themselves, unless repugnant and foreign to the design of the institution, and contrary to the laws of the land, and then they are void. To have a common seal, but which however is not absolutely necessary. To do all acts, make contracts, or authorise others to make contracts, to execute the purposes for which they were created.

By the common law, corporations must always appear in suits by attorney; the statute law enacts, that towns, trustees for schools, proprietors of common and undivided lands, grants and other estates and interest, and all other lawful societies or communities, may sue and prosecute suits, for the recovery of their rights, in any proper court, and may appear by themselves, agents, or attorneys, and in like manner, defend in all suits. In all such cases it is sufficient notice to the corporation, to leave a copy of the writ or summons with their clerk, selectmen, or committee men, twelve days

The only way that a corporation can legally express their minds, or do any act, is by the vote of the majority of the members legally convened, and which must be certified by their clerk, or some person duly authorized for that purpose, under the seal of the corporation, if they have one. There are however certain officers in all corporations, who are vested with certain powers, which they can execute personally : but in the proper business of the corporation, they must meet, and the act must be done by the vote of the members. Thus, if a corporation commence an action, an individual cannot discharge or controul it, but it must be done by act of the corporation, or some person to whom they delegate that power. If a town have a debt against a person, it can be discharged only by an act of the town, and not by an individual of the town.

A corporation can commit no crime in its corporate capacity, cannot be an executor or administrator, or perform any personal duties, and cannot be committed to prison, for the existence being

ideal, no man can apprehend or arrest it, but the estate of the corporation is liable to be taken on execution for their debts.

III. We close this subject, with considering the mode of dissolving corporations. It is manifest, that the legislature have the power of dissolving or altering all corporations of a public nature, as counties, towns, and societies, but corporations of a private nature can be dissolved only by the death of all the members, by the surrendry of its franchises into the hands of the assembly, or by a forfeiture of its charter, through negligence or abuse of its powers and privileges. In the last case, the regular mode of proceeding is, to bring an information, in the nature of a quo warranto, to enquire by what warrant, the members now exercise their corporate power having forfeited them by certain acts, which are pointed out in the information. The court must enquire into the facts, and if they are found true, and amount to a forfeiture of the charter, they may and the corporation is dissolved.

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## A SYSTEM

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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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BOOK THIRD.

## Of Things.

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CHAPTER FIRST.

### OF THE NATURAL TITLE TO THINGS.

**H**AVING in the preceding books entered into a minute account of the constitution and government of this state, and the rights and privileges of its citizens, I proceed in the next place to the contemplation of Things, which are the principal objects of all political regulations. It will be amusing to the inquisitive mind to open these enquiries, by a slight view of the origin and foundation of property, and the method by which an exclusive title to it is acquired.

When we observe mankind in the use and improvement of the things of this world, it is manifest that they were created for their benefit and happiness. The original design of the supreme author of nature, has furnished infallible evidence of the common right of man, to the enjoyment of the blessings that are placed within his reach. It is upon this original and natural principle that the right of property is founded. Antecedent to the existence of civil regulations, men possessed all things in common. Every one had the power to convert to his own use, whatever his necessities required. But whenever any person had manifested a design, to appropriate any particular thing to his own use, by taking it to himself, he was  
entitled

entitled to exclude all others from interrupting him in the enjoyment of it. This is the foundation of the exclusive right of property. While mankind remained in a state of nature, this principle furnished the only rule of conduct. While all things were in common, every one had the right of choice ; but when any person had made his election, no other could justly take from him, what he had taken to himself. This principle is finely exemplified by the comparison of a theatre, which tho' equally open for every person that comes, yet the seat which any individual has chosen and taken, is in a proper and peculiar sense his own ; for the moment any place is filled, nobody has a right to remove the occupier for the purpose of seizing it for himself.

This taking possession of any particular thing that lies in common, and appropriating it to one's own use, has by writer's on natural law, been denominated occupancy, and considered as the natural foundation of the exclusive right of property. Some writers contend that the right of occupancy is founded upon a tacit and implied consent of all mankind, that the first occupant should become the owner ; and others, that the act of occupancy being a degree of bodily labor, is from a principle of natural justice, without any consent, sufficient to gain a title. This fine-spun reasoning upon so plain a subject, is singular and unaccountable. The common right of man to things, all must acknowledge originates from the constitution of nature, without any implied consent, or personal labor. The exclusive right manifestly depends upon the same principles, because it exists prior to and independent of any consideration of consent or labor. A man when in the primeval state of nature, he collected acorns from the trees, or killed the beasts of the forests, to satisfy the cravings of hunger, did not enquire whether all the human race had tacitly acknowledged his right, nor did his personal labor meliorate the things he consumed : but he felt that they were created for his use, and that he had a natural right to make the appropriation. The idea of a common right to things, includes the doctrine, that every person may acquire an exclusive right to a particular thing, by appropriating it to his own use. The necessary consequence is, that the  
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electing any particular thing, the taking possession of it, the act of appropriation, create an exclusive title. This is the act of occupancy, and as it is the proper evidence to establish the right, it has by a very common figure been called the right of occupancy.

When the first occupier abandons a thing, which he has taken, it reverts to a common state, and others may take it in their turn. There are many things which perish in the use ; but land is capable of a temporary improvement, and we find in the pastoral age of society, that the wandering tribes, which inhabited the earth, took possession of convenient places for the pasturage of their herds and flocks ; and when they moved to other places, they were succeeded by other tribes, who occupied the ground in the same manner. While they were in actual possession of a particular spot, they considered themselves as having an exclusive right, and that none had a right to interrupt them in the improvement of it. Their dereliction gave to others a similar right ; and such is the title to lands in the pure pastoral age of society. But when mankind in the progressive course of improvement, advanced to the age of agriculture, they discovered the advantage to be derived from a permanent title to the ground, which they cultivated.

“ When an individual had bestowed a portion of his labor on a particular spot, and thereby rendered it more productive, than it was in a state of nature, the idea was easily adopted, that his right to that spot did not expire with every temporary dereliction of possession. He was entitled to the produce in the course of the seasons. This led to the division of lands. Then portions were in the first instance distributed among the nations of the earth, and afterwards by a progressive subdivision, assigned to tribes, families, and individuals.

“ To effectuate the still further advance of civilization, labour, and industry were necessary : which led to a variety of inventions, by which the gifts of nature were made to contribute in a far greater degree, to the conveniences of life, than they were capable of doing in their primitively uncultivated state. Things derived an accession of value from labour, which they had not in their primitive state, and it was just, that the produce

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“ of each man’s industry should be so far his own, that no other  
 “ should share the benefit of it, without his permission. New  
 “ ideas of property then necessarily presented themselves to the  
 “ mind, whereby every one who possessed himself of things which  
 “ he improved by his labour and industry, was considered as having  
 “ thereby acquired a right to retain them as his own, altho they  
 “ were not necessary to his immediate use, and by which he ac-  
 “ quired the power of disposing of them at his will and pleasure  
 “ to others. This laid the foundation on which exclusive property  
 “ in moveable goods was established by civil law, of which the cha-  
 “ racteristic is, that others are always excluded ; whereas in a  
 “ communion of goods in a state of nature, others are not exclu-  
 “ ded from things of which any one is possessed, except so long  
 “ as they are in the actual use of the present occupier.

It is evident that the power to dispose of property, is one of the essential qualities of ownership, and is founded on the nature of the right. When an individual has brought to a state of cultivation, a spot of ground, or gathered the fruits of the earth, or caught the beasts of the field, he has the power of exchanging them with another, and the person to whom conveyance is made, upon making satisfactory compensation to the original proprietor, succeeds to his right and interest. It is not a mere dereliction by the first occupant, and the possession, or occupancy by a successor that transfers the right. It is the mutual agreement and consent of the contracting parties. This power of disposing of property, originates from the same source as the power of acquiring it, when it lies common to all mankind.

When a man has thus obtained an exclusive right, to particular things, with the power to retain or dispose of them at pleasure, it is to be considered what shall become of them, when death separates him from all his worldly enjoyments and possessions. This involuntary dereliction of property, leaves it to be occupied by some other person, and according to the opinion of some writers, it naturally reverts to its original state, and would be subject to be taken by the first occupant, were it not for the interposition of positive law. But this opinion cannot be well founded ; for when a

man has acquired an exclusive right to a certain thing, and added to the value of it by his own labour, it is consonant to nature, that he should determine who should enjoy that property which he can enjoy no longer. Every person will have children, relations, or friends, with whom he is connected by the strongest ties of affection and friendship. To promote their welfare, he will be prompted by the most powerful motives that influence the mind, and the idea, that he can appropriate the fruits of his labour, to their happiness, will be the strongest incentive to industry and perseverance in the acquisition of property. The existence of this principle in the human mind, is sufficient to evidence that mankind have by nature, the right of disposing of their estate, in a manner correspondent to their wishes and feelings.

The same principles apply in cases where the owner has not determined, to whom his estate shall descend after his decease. The children and relations of the deceased, have a natural right to the property, relinquished by the death of the owner : for it is presumed, that the deceased owner, would have desired that the fruit of his industry, should be appropriated to the benefit of those with whom he was connected by the ties of consanguinity, and this had naturally led mankind to the adoption of this practice. But the particular relations that should inherit, and the mode of distribution, has been regulated by civil institutions. It is a universal custom among civilized nations, that the proprietor of an estate shall have the power of disposing of it by will, and in case of his dying without a will, that his estate shall descend to his nearest relations. The universality of the custom, is conclusive demonstration, that it is founded in the natural feelings of mankind.

• To all things, which by the nature of them, cannot be reduced to permanent property, mankind acquire a right by occupancy, such are the elements of light, air, and water, in which man can have only a temporary use : also all animals of a wild and untamable disposition. These when taken and in his possession, or when killed, become his property : but when wild and at liberty, they may be taken by any person whatever, of common right, but in all

things, where permanent ownership can be had, the positive law of society steps in, and assigns a certain owner.

By nature we are led to acquire property, and by the same power, we are authorised to dispose of it. But nature does not stop here. By this same principle we are as strongly impelled to unite in society, as we are to acquire property. Should a number of human beings be placed upon an uninhabited island, without laws and government, their first acquisition of property, must be by occupancy, but they would immediately unite in society, and establish laws for the government of the community, and the regulation of property. Nature has pointed the mode of acquiring a title to earthly things, and the power of disposing of them. In the most simple and uncorrupted state of mankind, no particular formality was necessary. A verbal deed and a verbal will were equally authentic and operative with all the solemnity of signing and sealing. But mankind in the progress of society, discovered that such simple modes of conveyance, opened the door to endless frauds and deceits. Hence positive law introduced certain forms and ceremonies, as requisite to constitute a deed or will, for the purpose of preventing imposition in the conveyance of property, and uncertainty, respecting the title. That a deed or will should be in writing, and signed and sealed by the party, is clearly an institution of positive law. That man has the right to dispose of his estate by deed, or will, is clearly the result of natural law.

From these observations, it appears that the laws of nature are the ground work of civil establishment, and that positive institutions were introduced to guard, protect, and defend the natural rights of mankind. These regulations have now superseded the dictates of simple nature, and in the acquisition of property, we pay no regard to them, but are wholly governed by the directions of the positive laws of society. These to counteract the fraud, and wickedness of individuals in different periods, during the progressive improvement of jurisprudence, have now become so numerous and complicated, that great skill and learning are requisite to ascertain the political regulations, that controul, restrain, and govern the conduct of the citizens of the state, every day of their lives.

## CHAPTER SECOND.

## OF THE SEVERAL KINDS OF THINGS.

THE word things, is a very extensive term, and comprehends whatever cannot be predicated of a person, or human being. There are many things which are subject to the property and dominion of man ; and in that light, they are to be considered in this book of our enquiries.

Property in its strict and literal sense, is only that right and dominion, which a man has by law in things. But by a very common figure, this term is used to signify the thing itself, in which a man has property. The word property, therefore, signifies things, over which, man is in the immediate exercise of power and dominion. The word things is a naked description without any reference, or relation to ownership by man.

Things are naturally divided into *real* and *personal*. Things real, are permanent and substantial. They are immoveable as to place, and perpetual as to duration. Things personal, may properly be also called moveable. They are the reverse of things real, the owner can remove them from place to place, their duration is uncertain, and they are subject to change and to perish. Such is the natural division of things, and it compleatly comprehends every species. But the institutions of civil society have made necessary other divisions of property, for the purpose of regulating its improvement and enjoyment : and this being the point of view, in which we are to consider things, I shall make such distinctions and divisions as have been introduced and established by law. In addition to this general division, we find there is a species of property denominated incorporeal, which is defined to be an ideal right, existing in contemplation of law, and issuing out of substantial, corporeal property, either real or personal. Personal things have been subdivided into chattels real, and chattels personal. Chattels real, have been defined to be a compound of real and personal things, possessing the immobility of the one, and the limited duration of the other, as an estate for years in lands, the land being immoveable, but the term to expire in a limited period. Chattels

personal, are comprised in the usual definition of things personal. In treating of these different kinds of property, I propose in the first place to consider things real as being the most important to mankind. With this subject, I must consider chattels real, because they result from and are an appendage of real property.

In the next place, I shall fully explain the subject of personal property; and shall close with a few observations upon things incorporeal, as they are the fruits of the other kinds of property. On this subject, I shall be very concise, as there can hardly be said to be a necessity of introducing this division of property into a treatise upon our laws; but as it is known to the common law, it may be proper to explain it, for the purpose of assisting the reader in acquiring a knowledge of the common law.

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### CHAPTER THIRD.

#### OF THINGS REAL.

**T**HINGS real have already been defined to be fixed, permanent, and substantial. In observing upon this subject, no better method can be pointed out, than the one adopted by Sir. William Blackstone, in his commentaries on the laws of England. To define in the first place the nature of real property, in the second place, the tenure, in the third, the different estates that may be had in it, and lastly, the various titles to it, and the manner in which they may be acquired or lost. This chapter will consider the first of these divisions and define the nature and extent of real property.

It is generally said, that things real consist of lands, tenements, and hereditaments. <sup>b</sup> Land in its legal and most extensive signification, comprehends every kind of real property. It includes any ground, soil, or earth whatever, as arable, meadows, pastures, woods, moors, waters, marshes, furlies, and heath. It also in its legal meaning comprehends all houses and buildings whatever, standing on the land: for they consist of two things, the ground being the foundation, and the structure thereon; of course, if the land, or ground be conveyed, the building being annexed to it is transferred with it.

Land

<sup>b</sup> Co. Lit. 4.    2 Black. Com. 27.

Land in its most natural and vulgar meaning, includes nothing but earth ; but the law has annexed to the word this artificial meaning, by which it comprehends every thing upwards in a direct line to the heavens, and every thing downwards in a direct line to the center of the earth. No person has therefore a right to erect a building that shall hang or reach over his neighbour's land ; nor to dig a mine that shall run under his neighbour's land. The owner of the surface of the ground, owns all that is over and under it, — and the conveyance of land simply conveys, not only the face of the earth, but all mines, woods, waters and buildings, as well as fields and meadows. It is true, that these particular things, excepting water, may be granted, or conveyed by their respective names : but nothing will pass thereby but the thing specified, and what falls literally within the meaning of the term made use of : but land being a general term, the conveyance of it transfers every thing annexed to it either above or below the surface, not only buildings, and mines, but corn, fruits, and herbage growing thereon, which are considered as a part and parcel of the realty till severed from it. So whatever is fastened to a house, is considered as part of the realty, and passes with the building. It seems singular, that water should pass under the denomination of land ; but the fact is, that water cannot be conveyed on account of its perpetual fluctuation, and change, and no man has any thing more than a temporary, usufructuary property in it : but the land, or ground covered by water, is permanent and substantial, and the conveyance of it by operation of law, conveys the water that covers it. A grant of the water, passes only a right to use it, or a right of fishing.

‘ Tenement is a word of more extensive signification than land, tho generally speaking it is applied only to buildings, yet in its primary and legal sense, it includes every thing that may be holden, and is of a permanent nature, whether corporeal, or incorporeal.

Hereditaments by the English common law, is said to be a term of still larger signification, comprehending not only lands and tenements, but every kind of property that can be inherited, and which on the death of the owner, descends to his heirs, and goes not into the

the hands of the executor or administrator. By the English common law, certain implements of furniture, of a personal nature, under the name of an heir-loom, descend by custom to the heir, together with the house, which being inheritable, are called hereditaments, as well as lands. But our law knows nothing about heir-looms. If we take the word hereditament according to the English definition, that is, to comprehend every thing that can be inherited—then the word would be as extensive as the word property, because every species of property by our law can be inherited : but the word has never been extended beyond the meaning of it as limited by the English law, and as we know of no personal property, that can come within the idea of an heir-loom, the consequence is, that this word here can be of no larger import than lands or tenements, and whenever it is used in our statutes, it is not intended to comprehend any thing but real property, particularly as it is used in the statute of frauds and perjuries. As hereditament is nearly synonymous with other words, as it is apt to lead the mind to mistakes concerning it, by the common law definition of it, and as there can be no necessity for the use of it, to explain our law, it must be considered as an improper and unnecessary term, and ought to be rejected.

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#### CHAPTER FOURTH.

#### OF THE TENURE OF THINGS REAL.

WE can hardly say with propriety, that there is a tenure of our lands, for this seems to imply upon the principles of the feudal system, a holding them of some superior. But the truth is, that our lands are not holden of any person. Every proprietor has an absolute and direct dominion in his own right in the soil independent of any superior.

As that branch of our jurisprudence, that respects landed property, has never been embarrassed with the slavish principles of the system of feuds, it will be unnecessary to enter into an investigation of that copious and interesting subject, a subject which has been illustrated and exhausted by the labours of the greatest literary characters

ractions in the republic of letters. It would be a rich source of amusement to ascend to the origin of that system, and trace its progress and variations to the present period. But as this is not within my plan, I shall confine my researches to a few observations that respect the laws of this state.

In the settlement of this country, our ancestors, as soon as they united in society, considered the right to the territory, to be vested in the public, and proceeded to make grants to individuals. The charter of Charles II. confirmed the title of the lands, to be holden of him, his heirs and successors, in free and common socage, rendering as a rent, one fifth part of the profits of all the mines of gold and silver, that should be discovered in the granted territory. Socage at this time was the freest and noblest tenure in England. Such lands were said to be holden of some superior, on the consideration of rendering a rent reduced to a certainty, and of a free and honourable kind; but as there were no mines of gold and silver within the territory granted by the charter, there was no actual reservation of any rent. Of course, the lands were only nominally holden in socage, but the proprietors had in effect, an absolute allodium. On the separation of this State from the British empire we ceased to hold our lands by the nominal tenure of socage, tho in the revision of our laws in 1784, the statute was retained, which declared the tenure to be free and common socage, yet as the proprietors of our lands were not subjected to any of the duties required of tenants in socage, they could never be considered otherwise, than holding allodial estates.

Since writing the foregoing, the legislature have passed the following act. An act declaring the tenure of lands in this state.—Whereas by the charter of Charles II. the lands in the then colony of Connecticut, were holden of the king of England, by the tenure of free and common socage, and by the establishment of the independence of the United States, the citizens of this state, became vested with an allodial title to their lands. Be it therefore declared, That every proprietor in fee simple of lands, has an absolute and direct dominion and property in the same.



OF THE SEVERAL KINDS OF ESTATES IN THINGS  
REAL.

**A**N estate in lands, signifies the interest that the owner has in them. Estate is a term common to all kinds of things, and is frequently used as synonymous with property, including the thing itself, as well as the interest the owner has in it. We have heretofore remarked, that property literally speaking, was applicable only to the dominion and ownership we have in things, tho by custom, it is now extended to the things themselves. Thus, estate properly signifies nothing but the kind, or quantity of interest, that the owner has in things, tho by custom it has been extended to the things themselves: but in our present enquiries, the term will be taken in its literal sense.

Estate then may be defined to be a term importing the state, condition, and circumstances of the owner, in respect to his property. To obtain a precise idea of estates, we must consider them in a threefold view: first in respect of the quantity of interest the owner has in things: secondly, the time such interest is to be holden and enjoyed: and thirdly, the number and connexion of the owners.

We begin in the first place, to consider estates in respect of their quantity of interest. This is ascertained by their duration and extent, and the power of the owner to use and improve. Estates therefore must necessarily be of different kinds. Some are for the life of the owner, or of some other person, being as uncertain as the lives of men. Others are reduced to certainty, being circumscribed in a limited period of time, as so many years, months, or days; or estates may be unlimited and perpetual, being vested in the proprietor, and his heirs and assigns forever. The power of the owner to improve his lands, is according to the nature of the estate. An absolute proprietor may improve them according to his own pleasure, while a person who has a limited estate must improve it according to certain restrictions resulting from the nature of it. Thus the duration of the estate, and the power of using it, determine the quantity of interest.

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The most general and primary division of estates, is into estates of freehold, and estates less than freehold. An estate of freehold, by our law, may be defined to be where the proprietor has a lawful right to things real, to hold and improve them for the term of his own life, and all such proprietors may be denominated freeholders. Estates of freehold are subdivided into freehold-estates of inheritance, and not of inheritance, being for life only. The former are divided again into estates of inheritance, absolute, or fee-simple; and estates of inheritance, limited or fee-tail. Estates not of inheritance, or for life, are divided into conventional or such as are created by the act and agreement of the parties, and such as are legal, resulting from the construction and operation of law. The former comprehend estates created by leases for life, and the latter where a person is tenant by the curtesy, and a widow is tenant in dower. Estates less than freehold are divided into three kinds. Estates for years, estates at will, and estates by sufferance.

By the law of England, every owner or holder of lands, is called tenant, such as tenant in fee simple,—fee tail,—for life, or years. This originated from a doctrine in the feudal system, that the absolute property of the soil is in the king, and that all the subjects hold of him, as the superior lord. This properly establishes them to be tenants. But in this state, we never apply the word tenant to the owner of an estate in fee. He may properly be denominated the proprietor in fee, for the purpose of expressing the independent nature of our title to real property. The term tenant, has ever been applied to those persons, who having an estate, less than fee simple, may with propriety be said to hold of, or be tenants to the proprietors in fee.

No person is considered in contemplation of law, to be the owner of real property, unless he has a freehold estate. All estates of an inferior nature, are called chattles real, and the owners are deemed to have nothing but a usufructuary right in the soil.

## OF ESTATES IN FEE SIMPLE.

**T**HIS is the largest and noblest estate that a man can have in real property. The proprietor is invested with an absolute power to improve and dispose of his lands as he pleases. Almost all our estates in this government are of this nature. Our ancestors being animated with the spirit of freedom and equality, at the time of their emigration from England, where they had experienced the inconvenience of feudal restraints upon landed property, were determined to hold their possessions by the freest tenure, and clearest title. To this happy circumstance we are now indebted for singular advantages and privileges. Had this country been first settled by a colony under the direction and controul of the British crown, it is probable that our lands would have been incumbered with all the restraints of the feudal system, and our titles involved in the labyrinth of English jurisprudence. But as the government at first, granted the territory to be holden in estates in fee simple, so the subsequent conveyances have generally passed similar estates. In consequence of this, almost all the lands are now in the actual possession and improvement of proprietors in fee. As we never have admitted into our code of laws, the doctrine of primogeniture, or the entailment of estates, our lands are distributed among the proprietors in that equal manner, which is favorable to the highest cultivation, and calls forth the greatest exertions of industry. We behold Connecticut divided into well-proportioned farms, exhibiting a rapid progress in agricultural knowledge, and possessed by a race of respectable farmers, in the enjoyment of that ease, independence and moderate affluence, which produce the most permanent felicity, which falls to the lot of any portion of mankind.

To understand this subject, we must explain the meaning of fee simple. The term fee is derived from the law of feuds, which was established in Europe by the conquerors of the Roman empire. In the division of the lands by those conquerors, two kinds of estates were granted, which were distinguished by the name of feud, and allodium. Feud, fief, or fee, may be defined to be an estate in lands, holden by a tenant of some superior lord, and granted to him originally

ginally as a stipend or reward for services done, and were to be holden on condition of performing further services, which rendered it a conditional estate. Such estates were granted to the vassals of the chiefs and leaders who made conquests of parts of the Roman empire. Allodium, or alleud, may be defined to be an absolute estate in the proprietor, holden unconditionally and independent of any superior. Such estates were granted to the freemen of the nations, who attended the northern conquerors in their successful expeditions. These estates were however converted into feuds, which in the progress of society underwent an infinite variety of changes, and gave birth to that intricate system of jurisprudence, respecting landed property, which has so long employed the researches of the lawyer and antiquarian.

To hold lands in fee, according to the primary meaning of the term, was to hold of some superior, upon condition of rendering certain services, while the ultimate property of the soil rested in the superior. / But in England this term is not now used in its primary sense. A fee is defined to be an estate of inheritance, being the highest interest that a man can have in lands. When the word fee is used without any addition, or with the addition of the word simple, it is opposed to fee conditional, or fee-tail, and denotes an unconditional, unlimited estate, transferable at pleasure, and descendible to the heirs general. Such is the meaning of this term, as used in our laws. But considering the nature of the tenure of our lands, we may with propriety say that fee is synonymous with allodium, and in this light it will be contemplated in our ensuing enquiries.

The incidents to estates in fee simple are, that the proprietor has the power to transfer, and devise them to whom he pleases, that they descend to his heirs generally, according to the statute law, in case no disposition is made by will, that he is accountable to no person for their use and improvement, and may commit waste, or do any act which he pleases.

§ The fee simple in all lands rests and resides at all times in some person. This being the largest possible estate, it comprehends all inferior and lesser estates into which it may be divided. If a proprietor

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f 2 Black. 106. § 2 Black. 107. Co. Lit. 348.

prietor in fee makes a lease for years, the freehold remains in him, and his heirs, and the lessee has only a temporary estate, inferior to a freehold, and at the expiration of the lease, the land reverts to the grantor in fee. An estate of freehold in fee simple, may be divided and carved out into all the inferior and lesser estates, and on the expiration of such estates, the lands revert to the proprietor in fee. The fee simple of lands is sometimes in abeyance, in remembrance in law, there being no person in existence, where it can actually vest : yet it exists in idea, and vests in the proper owner whenever he appears. Thus for example, in a grant to one man for life, and then to the heirs of another forever, it is evident that the fee simple is not in him, who has the estate for life, and the heirs of the other can never be known till his death, for nobody is the heir of the living, therefore there is no person in being who has the fee simple, of course it remains in abeyance.

<sup>b</sup> It is a general rule of law, that to create an estate of inheritance by deed, it is necessary to use the word heirs, and that no circumlocution, or other words, will supply the want of that word. A conveyance to a man and his assigns forever, transfers only an estate for life. <sup>c</sup> This general rule however, does not operate in devises ; for these having been introduced at a later period, their construction has been more liberal. If the devise contain words that sufficiently evidence an intention in the devisor to transmit an absolute, perpetual estate, then the intention of the devisor shall be pursued, and the devisee shall take an estate of inheritance. Thus a devise to a man forever, to one, and his assigns forever, or to one in fee simple, will vest an estate of inheritance in the devisee, because the words sufficiently evidence such an intention in the devisor, tho he does not use the word heirs. But a devise to a man, and his assigns, without annexing words of perpetuity, transmits only an estate for life.

<sup>d</sup> In grants of lands to corporations, the word, heirs, is not essential, because corporations have no heirs, but the word, successors, seems to be the proper term, denoting the same relation between corporate persons, as the word heir, and ancestor, between natural persons ; therefore in grants to corporations, successors usually

supply

<sup>b</sup> 2 Black. 107.    <sup>c</sup> Ibid. 108.    <sup>d</sup> 2 Black. 109.

supply the place of heirs ; but this is not necessary, because, tho a grant to a corporation without words of perpetuity, will create only an estate for life, yet as a corporation never dies, an estate for life must be as large as they can possibly take. Of course, a simple grant to a corporation, constitutes a perpetual estate equivalent to a fee simple.

## CHAPTER SEVENTH.

## OF ESTATES IN FEE-TAIL.

**E**STATES in fee-tail, are where the lands are limited to some particular heirs, and do not descend to the heirs in general. To explain this subject clearly, it is necessary to recur to the English law, and deduce the origin of these estates.

At common law estates in fee simple were of two kinds. Fee simple absolute, which we have considered in the preceding chapter, and fee simple conditional, which we are now to consider. A conditional fee was restrained to some particular heirs, in exclusion of others, as a limitation to the heirs of a man's body, which admitted lineal, and excluded collateral heirs : or to the heirs male of a man's body, which excluded collateral and female lineal heirs. But to all estates of this kind, a condition was either expressed, or implied, that if the donee died without such particular heirs, the land should revert to the donor. The estate therefore, was a fee simple, on condition that the donee had issue. When the grantee had issue born, the performance of the condition vested in him an absolute estate, with power to alien, so as to bar his own issue, and the reversion to the donor, and to charge it with certain incumbrances, binding on his issue, and such estates were then subject to forfeiture for treason. But if no alienation was made by the donee, then in default of such heirs as were described in the deed, the land at any future period would revert to the donor, because no heirs could take by descent, only those to whom the estate was limited. It therefore became the practice for the grantees, as soon as the condition was performed by the birth of issue, to alien to some friend, and then instantly repurchase, and take back a conveyance, which rendered the estate a fee simple absolute, defeated the condition, barred

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the reversion to the donor forever. But the nobility discovering that this practice defeated them of their reversions, and prevented them from perpetuating their estates in their families, procured to be passed in the reign of Edward I. the celebrated statute of Westminster the second, which enacted, \* that the will of the donor as expressed in the deed, should be observed, and that the donee should not on birth of issue, alien the estate : but that the same should remain to his heirs, if he had any, and on failure, should revert to the donor, or his heirs. In construction of this statute, the judges determined, that the donee had not a conditional fee, but they divided such estates into two parts, leaving to the donee a new kind of estate, which they denominated fee-tail, signifying a limited estate, and vesting in the donor, the ultimate fee simple of the land, expectant on the failure of the issue, which is called a reversion.

These estates are divided into general and special. Tail general is where lands are given to one and the heirs of his body begotten, which allows his issue by every marriage to inherit the estate. Tail-special, is where the estate is restrained to certain heirs, as the heirs of his body, on Mary his now wife to be begotten, which excludes issue by any other marriage. These are subdivided into tail-male, and tail-female, both which may be general and special, for the purpose of distinguishing the sexes, to whom they are limited to descend. The word heirs in the donation, is necessary to create a fee, and some words of inheritance or procreation, are necessary to make a fee-tail, as heirs of his body, or heirs of his body, to be begotten on his wife. The omission of his heirs can be supplied by no other word, and such deed will transfer only an estate for life.

The entailment of estates being found extremely inconvenient, and detrimental to the public, by aggrandising particular families and preventing the free transfer and alienation of landed property, every possible method was devised to exonerate it from these restraints. The collusive fictions of fines and common recoveries, were introduced for the purpose of docking entailments, and became a very common mode of conveyance in England. Statutes were made at different periods, which subjected estates in tail to forfeiture

forfeiture for treason, made them chargeable for debts due to the king, and liable to be sold for debts contracted by a bankrupt tenant.

The incidents to estates-tail, by the law of England, are that the tenant may commit waste, his wife shall have her dower, the husband of a female tenant in tail, may be tenant by the curtesy, and that an estate tail may be barred, or destroyed by lineal warranty, descending with assets to the heir.

In this state, it has been supposed by some, that the English law respecting the entailment of estates was in force. Estates of that kind have been created, and common recoveries have been suffered. But this was an erroneous opinion. " Our courts have never recognized the doctrine of conditional fees at common law, and have never admitted of estates in fee-tail. A statute has lately been passed in affirmance of a principle of common law, adopted and established by the courts of judicature. <sup>p</sup> By this statute it is enacted— " that no estate either in fee simple, fee tail, " or any lesser estate, shall be given by deed, or will, to any person, or persons, but such as are in being, or to the immediate " issue or descendants of such as are in being, at the time of making such deed or will. And that all estates given in tail, shall " be and remain an absolute estate in fee simple, to the issue of the " first donee in tail." Such is now our statute law, and such has ever been our common law. Here we have the pleasure to observe that the transfer of our lands, is not fettered and burdened by the restrictions and incumbrances, with which they are perplexed and embarrassed in England; and that we have no occasion to acquire a knowledge of this branch of their jurisprudence, only to explain some terms that have been borrowed from it, and introduced into our own.

In construction of this statute, it may be observed, that all deeds or wills, that contain the words of limitations used in England, vest an estate in fee-tail in the first donee, and a fee simple absolute, in his issue or descendants. All such estates therefore during the life of the first donee, partake of the legal qualities of such estates in England, but have a total different operation after his death



death. To create an estate-tail, by our statute there must be some words of inheritance, or procreation made use of—as heirs of his body—otherwise, it will be a fee simple. All gifts in the form prescribed by the law of England, to create an estate-tail, will create one by our law.

The first donee, or tenant in tail, cannot alien for a longer time than his own life, so as to bar the issue, or the reversion. The policy of this regulation by our statute is apparent. The father may discover in his son, marks of prodigality and profusion, that would render it unadvisable to vest him with the absolute property of lands. By this mode, he may make a safe provision for him during his life, and prevent him from running into extravagance, by depriving him of the power of squandering away his property; and the limiting of an estate for a single life, is not productive of the inconveniences of perpetuities. Tenant in tail, cannot do any act by which he can make the lands chargeable with his debts, after his decease.

It is not in the power of the first donee in tail, to do any act by which he can become invested with a fee simple, and defeat the issue or reversioner. As the statute has expressly authorized the proprietor in fee, to carve out such an estate, it precludes the existence of a power to defeat it. It therefore may be established as a general principle, that fines and common recoveries, or any mode that has been adopted in England, cannot be introduced here, to dock such entailments as are warranted by statute. To allow such a power would be defeating the humane and beneficial intentions of the law. It would prevent a father from making suitable provision for the support of a prodigal son during life, because it would allow the son a power to invest himself with an absolute estate in the lands conveyed to him for life, and by squandering it away, defeat the benevolent design of a parent, and disinherit his own offspring.

In England, common recoveries were introduced to unfetter the perpetual entailment of estates, which reduced the nation to slavery, and discouraged industry and agriculture. But as in this state

we admit only of an entailment for a single life, which is dictated by sound policy, and produces none of the mischiefs of perpetuities, it is manifest that no method can be allowed to defeat it.

Upon a failure of issue of the first donee in tail, the land shall revert to the donor, or on his decease to his heirs, and shall not vest in the collateral heirs of the donee. But if the donee die, leaving sundry children, the estate will vest in the particular heir or child to whom it is limited.

As our statute has borrowed the description of an estate from the English law, it necessarily recognises all the incidents that result from the nature of it. The incidents then to an estate in tail, are the four following.

1. The first donee, or tenant in tail, may commit waste on the land by felling timber, pulling down houses and the like, without being impeached, or called to account therefor, in as ample a manner as proprietor in fee can do. 2. The wife of the first donee shall have her dower, or thirds in the estate tail. 3. The husband of a female tenant in tail, may be tenant by curtesy of the estate-tail. 4. An estate tail, may be barred, or destroyed by lincal warranty, descending with assets to the issue of the first donee, that is, if such donee alien in his life time, with warranty, and then leaves sufficient estate, which descends to the heirs, to make good the warranty, by which they would be liable on the covenants of warranty, in case of an eviction of the purchaser of the estate-tail, then such heirs shall be barred of a recovery of such estate, so aliened by their ancestor : because it would be an absurdity to allow them to recover the lands of the purchaser, and then make them liable to pay back to him the value of it, upon an action brought against them upon the covenant of warranty.

But it is probable that all our learning respecting estates in fee-tail, will soon go into disuse ; for in consequence of the restriction of the statute, all the purposes of a conveyance allowed by it, may be answered by a person's making a gift to a man for life, and then to the heirs of his body forever, or any particular heir; which

is all that can be done by an estate tail, and in this case the donee is tenant for life, instead of tenant in fee-tail.

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CHAPTER EIGHTH.

OF ESTATES FOR LIFE.

**E**STATES for life, are freehold estates, not of inheritance, and there are three kinds known by our law. The first is created by the act and agreement of the parties. The other result from the operation of law, and are where a man is tenant by curtesy, and a woman tenant in dower.

I. *9* Estates for life created by the act of the parties, are, where a man by deed, devise, or lease, grants lands to another, to hold for the term of his own life, or for that of any other person, or for more lives than one. Where the grant is to a man for his own life, he is called tenant for life: where the grant is to a man for the life of another, he is called tenant for another's life. The most usual method of creating estates for life, are by lease: but they may be created not only by express words, but by a general grant without defining any estate. As where a man grants lands to another, without specifying any estate, or heirs; this makes him tenant for life, for as no words of inheritance are inserted in the deed, it cannot be construed to be a fee; but the estate shall be construed to be as large as the words in the deed will warrant, and therefore if the grantor have authority to make such a grant, it shall be construed to be an estate for the life of the grauttee.

All estates for life, are generally considered to endure for the life of the person to whom they are granted. There are however, some estates for life, dependent on future contingences, which may be determined before the life for which they are created, expires. As where a man has an estate given to him for the life of another, or a woman during her widowhood, when the person for whose life the land is holden, dies, or the widow marries, the estates are determined and gone; yet while they continue, they are deemed

deemed to be estates for life, because their duration is uncertain, and they might possibly have endured for the life of the tenant.

The incidents to estate for life are. 1. Tenant for life, when he is laid under no restrictions in the deed by which he holds, may of common right take from the land necessary wood to repair or burn in his house, to make or repair instruments of husbandry, and to make and repair necessary fences on the land. By the common law he has right to improve the land in the same manner as tenant in fee, without impeachment of waste; and if he commit waste, no action will lie against him, and this seems to be the distinction adopted in the law, that where an estate is created by act of the parties, the tenant cannot be impeached of waste, because it is in the power of the grantor to secure his interest, and lay the tenant under proper restraints by the deed that creates the estate; but where estates for life result from construction of law, the tenant shall be restricted from the commission of waste, and if he do waste, shall be liable to an action, because it never was in the power of the heir in interest, by a contract, to limit or restrict the tenant in the use of the land. It is therefore necessary for every person when he grants an estate for life, to restrain the tenant by the deed from the commission of waste. But in England, by the statute of Gloucester, tenants for life, as well as years, are liable to an action of waste. Such is the common law, as stated by Coke, and Blackstone, but Reeve contends, that tenant for life, was punishable for waste by the common law.

2. Tenant for life, shall not be injured by any sudden and unexpected determination of the estate, because the determination is contingent and uncertain. It is a general rule, that in all cases where the determination of an estate for life is dependent on a contingency, if it be determined by the act of God, or the act of the law, the tenant, unless the estate be determined by his death, and then his representatives, shall have the emblements, or profit of the crops growing on the land at the time the estate is determined: but if the estate be determined by the act of the tenant, the emblements shall go to the proprietor in fee. If a tenant for life sows the land, and dies before harvest, his executor shall have

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the emblements or profits of the crop : for the estate was determined by the act of God, and it is a maxim of law, that the act of God does no man an injury. The representatives, therefore shall have the emblements to compensate for the expense of sowing, and as an encouragement to husbandry, which would be discouraged in all estates of uncertain duration, if the tenant could not know with certainty, to whom the profits of his labour would go. If a man be tenant for the life of another, and he, on whose life the land is held, dies after the corn is sown, the tenant shall have the emblements. So if a lease be made to husband and wife during marriage and the husband sows the land, and afterwards they are divorced, by which the estate is ended, the husband shall have the emblements, because the divorce is the act of the law. If a tenant during widowhood, thinks proper to marry, she determines the estate by her own act, and shall not have the emblements. The doctrine of emblements extends to all corn sown, roots planted, and every thing that yields an annual artificial profit, in consequence of the labor of the tenant ; but does not extend to fruit, trees, grafts, and the like, which are not planted annually at the expense, and labour of the tenant, but are either the permanent, or natural profits of the earth.

3. If tenants for life lease out their estates to under-tenants, they shall enjoy all the privileges of the tenants for life, and in addition to them, shall not be prejudiced by the determination of the estate, by the act of the tenant for life, but in all such cases they shall be entitled to the emblements ; as if a tenant during widowhood marries, and determines the estate, yet the under-tenant shall have the emblements.

II. \* Tenant by the curtesy, commonly called the curtesy of England, results from construction and operation of law, and is defined to be where a man marries a woman possessed of a freehold estate of inheritance, and has issue by her, born alive, capable of inheriting the estate, that in such case he shall on the death of the wife, hold the estate for his own life. To constitute this estate, the requisites are, that there be a lawful marriage, that the wife be actually possessed of the lands, and not have a mere right to possess,

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\* 2 Black. Com. 123.

• Ibid. 126. Co. Lit. 29.

so that a man cannot be tenant by curtesy of a remainder; that issue be born alive, that might by law inherit; that it be born during the life of the mother, and not be delivered by the *Cæsarean* operation, and that the wife be dead.

The reason why this kind of estate is so denominated, is said by Littleton to be because it was in use only in England: but it appears by other writers to have been established in other countries. The origin of it is attributed by Blackstone to the feudal law, and seems to have been derived from this principle, that if a man marries a woman possessed of lands and has children by her, as he is the natural guardian of the children, it is reasonable that he should have the use and improvement of the land, to support and educate them. On the birth of issue his title commences, and the law will not defeat it by any subsequent event.

This estate is founded upon a singular principle; the capacity of the parents to have children, and the circumstance of their being born alive. It would be more rational to say, that the husband should hold during life, the lands of the wife after her death, whether they had issue or not, or that he should hold them, in case the issue survived her, and it was necessary to have the improvement of the lands for their education and support: But that the circumstance that the child be born alive, whether it live one moment or not, should be the event, on which the estate depends, is one of those unaccountable whims, which are sometimes adopted by accident, and continued by the authority of precedent. It is still more extraordinary, that the husband should be defeated of the estate, if the child be delivered by the *Cæsarian* operation: for there is precisely the same reason, why the father should have the estate of the mother for the education of children delivered by this mode, as by the common mode.

As incident to this species of estate, the tenant may of common right, take from the land, necessary wood to repair, or burn in his house: to make and repair fences and instruments of husbandry: for he has a right to the use and enjoyment of the land, and all its profits, during the continuance of the estate. But he is not permitted to cut down timber, or do any other waste, which is a permanent

nent injury to the soil, and unnecessary to take the temporary profits of the estate. *w* And if such tenant commit waste, he is liable to the heir in an action of waste at common law.†

In respect of emblements, and under tenants, the same rules apply in cases of tenants by curtesy, as tenants for life.

III. Tenant in dower, is where a widow is endowed of one third part of the real estate her husband died seized of, during her life.

In the consideration of this species of estate, it will be proper to point out, who shall be endowed, of what she shall be endowed, the manner how dower shall be assigned, and how it may be barred or prevented.

I. The person entitled to dower, or as it is commonly expressed, to thirds, is designated by the statute concerning the dowry of widows, which enacts, \* that every married woman, living with her husband in this state, or absent elsewhere from him by his consent, or through his mere default, or by inevitable providence, or in case of divorce, where she is the innocent party, that shall not before marriage be estated by way of jointure, shall immediately upon and after the death of her husband, have right, title, and interest, by way of dower, in and unto one third part of the real estate of her deceased husband, in houses and lands, which he stood possessed of, in his own right, at the time of his divorce, to be to her during her natural life. This statute makes provision for widows generally, and in one instance is so complaisant to the female sex, as to entitle a woman to dower in the lands of a man not her husband at his decease. This happens in the case of a divorce, where the woman is the innocent party. The divorce operates as a compleat dissolution of the marriage contract, yet the humanity of the law, will not permit a man to abuse his wife in such a manner, as to compel her to obtain a divorce, and thereby defeat her of her dower. On this statute a curious question may arise—Suppose a woman being the innocent party obtains a divorce, and both are again married, and then the man dies,

*w* Rose vs. Hays, S. C. 1791.

\* Statutes, 42.

† This decision of the superior court adopts the doctrine of common law, laid down by Coke—but a contrary opinion is maintained by Reeve, in his History of the English law. See Vol. ii. 83.

dies, shall his lawful and divorced wife, both be endowed of his lands? Can a woman having one husband, be endowed of the lands of a former husband? Upon a literal construction of this statute, these questions must be answered in the affirmative.

It seems to be a necessary construction of the statute, that a woman is not entitled to her dower, when she absents herself from her husband wilfully, without just cause, and continues to be absent unnecessarily, until his death. Such conduct, being an open infraction of the marriage contract, a forfeiture of the right of dower, is a proper punishment, and will operate as an additional inducement upon women, to pay a proper attention to their husbands, in the hour of sickness and distress. Tho the statute does not express this, it fairly implies it. A woman shall be endowed when absent without a fault of her own; if her absence be owing to her own fault, it follows that she loses her dower.

y By the common law, a woman must be more than nine years old, at the decease of her husband, to be endowed of his lands.

2. A woman is to be endowed by the statute, of all the houses and lands, her husband was possessed of in his own right, at the time of his decease; but has no claim upon lands aliened by him in his life time. By the common law, the wife had her dower in all the lands her husband ever owned, tho he had transferred them. This inconvenient encumbrance, on the alienation of real property, is repugnant to the policy of our laws, and has never been introduced.

z A question has arisen, whether by the statute, the widow has a right upon the death of her husband, to enter immediately into the actual occupancy of her thirds, in the real estate of which he died seized, in common with the heirs, or whether she has right only to have dower assigned, and till that is done, has no right to enter and occupy. It has been decided by the superior court, and the judgment affirmed by the supreme court of errors, that one third of the real estate, of which the husband dies possessed in his own right, immediately vests in the widow for life, in common with the heirs, before assignment, and does not depend upon being  
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set out, any more than the right of an heir depends upon the distribution of the estate; and that the distribution only severs the right which was as complete before as after.

3. The mode of endowing a widow, is described by the statute. "That if the person, or persons that have by law a right to inherit the estate, do not within sixty days after the death of the husband, by three sufficient freeholders of the the same county, to be appointed by the judge of probate, in whose district the estate lies, and sworn for that purpose, set out and ascertain such right of dower, that then such widow may make complaint to the judge of the court of probate in whose district the estate lies, which judge shall order and decree, that such woman's dowry shall be set out and ascertained by three sufficient freeholders of the county, who shall be sworn, faithfully to proceed and act therein according to their best skill, and the said dowry being ascertained and set out, in either of the methods aforesaid, and upon approbation thereof by said judge, the dower shall remain fixed and certain, and all persons concerned therein shall be concluded thereby." <sup>a</sup> A subsequent statute has vested this power in the court of probate, who has probate of the will, or the power of granting administration on the estate.

4. A woman may be debarred of her dower by elopement, or wilful absence from her husband, or by accepting a provision made for her by her husband, in his will in lieu of dower. A woman is not compellable to accept of such provision, but may refuse it and take her dower at law. If she accept such provision, she is bound thereby, and her dower is discharged. <sup>c</sup> But the dower of a widow is not barred by lapse of time. It is a charge upon her husband's estate, which no alienation of heirs, or creditors can defeat.

A woman that has been estated by way of jointure, before her marriage, is by statute barred of dower. This is all that our statute law says respecting jointures. We must therefore have recourse to the common law, for the explanation of a word recognized by the statute. <sup>d</sup> A jointure, may be defined to be an estate

<sup>a</sup> Statutes, 42.  
<sup>d</sup> 2 Black. Com. 137.

<sup>b</sup> Ibid, 486.

<sup>c</sup> Crocker vs. Fox, S. C. 1790.

in lands for the life of the wife, at least competent for her livelihood, to take effect in profit or possession, presently after the death of her husband. The title to the lands conveyed as a jointure must be valid, or it will not bar dower. If a jointure be made after marriage, the woman at the death of the husband may accept it, or refusing it, may have recourse to her dower at law. The word jointure originally signified, a joint estate to the husband, and wife, but extends also to an estate limited to the wife only. A jointure therefore may be created by any form of conveyance, that secures to the wife, the use or improvement of lands, for her life at least, and which ought to be expressed, to be in lieu of all her dower, and not of any particular part of it.

Jointures originated in England from the introduction of uses, by which one person had the use and another the property and possession of lands. As a woman could not be endowed of a use, jointures were invented, by which lands were conveyed to the joint use of husband and wife, during their lives. As uses have never been generally introduced into this state, the making of jointures has not become a common practice.

As to the incidents of this species of estate, they are the same as in tenancy by the curtesy. But in addition to the liability of the tenant, to an action at common law, for the commission of waste, the statute has provided—that every widow endowed of lands and houses, shall maintain all such houses, buildings, fences, and enclosures, as shall be assigned, and set out to her in dower, and shall leave the same in good and sufficient repair, and on failure thereof, the county court in the county where the estate is, on application made, may deliver so much of the said houses, and lands to the next heir of the same, as they shall judge to be sufficient, out of the rents and profits of the same, to repair such defects, unless such widows will give sufficient security for leaving the same in good repair.

## OF ESTATES FOR YEARS.

**E**STATE for years, or tenant for years, is where a man has the use and possession of lands, by a contract with the proprietor for a certain and determinate period. The method of creating such estates, is by lease, and the parties are denominated lessor and lessee. They are a middle kind of estate, between an estate for life and a tenancy at will. Let the period be ever so short, or long, yet in contemplation of law, it is deemed an estate for years, a year being the shortest period the law regards. Thus where a person has a lease of lands for three months, the law respects him as tenant for years, tho he can improve the lands no longer than the period limited in the lease. So a lease for a thousand years, is considered only as an estate for years, and the lessee has only a chattel interest, which by the common law, goes into the hands of the executor or administrator after his decease. The estate of such lessee, is not a freehold, while a person who has an estate for life, is considered as a freeholder, tho in the ordinary course of things it is not possible that such estate should subsist for so long a period, as the former. The reason of this distinction will be easily comprehended from a concise view of the origin of leases.

In the early periods of the English government, a lease for years was of small account, and was not permitted to extend beyond the term of forty years. They were made use of by the lords of manors, for the purpose of improving and cultivating the large tracts of territory, which they owned. To answer this purpose, short leases were as effectual as long, because the parties might renew them as often as they pleased. These leases for years, were at first under the power and controul of the proprietors of the lands, and might be defeated by a feigned recovery or conveyance, which rendered them for a period ever so long, a precarious and uncertain interest. In the reign of Henry VII. it was determined that leases for years should not be defeated by feigned recoveries, and untrue conveyances, but that the lessee should hold and recover possession of the land. This introduced leases for long terms, and they were used for the purpose of borrowing money upon  
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them, as well as for many other purposes, different from the original design of leases. When the term for which such leases could be made, was enlarged, these estates were considered of the same nature and subjected to the same regulations as leases for short periods. It would have been extremely inconvenient to have adopted different rules for long and short terms. They were all estates for years, and of course of the same nature, and it would have been difficult to fix upon a particular period, or number of years that should divide between estates for years, and freeholds. It was therefore necessary to apply the same rules to all estates for a certain determinate number of years, however different their period of continuance might be. Such estates therefore are deemed inferior to freeholds, and are contemplated as chattels real.

In consequence of the inferiority of estates for years, to freeholds, they may be created to commence in future, that is, a lease to commence in three months, or by a certain day, is good. But the conveyance of a freehold estate, must take instant effect, and if the estate be to commence in future, it will be void. This doctrine depends upon the old common law principle, that livery of seisin, or delivery of possession is necessary to pass a freehold, which must be done to take instant effect, and not to operate in future. But estates for years, being less than a freehold, no delivery of possession was necessary to pass them, and of course they might be created to commence in a future time : but where a freehold estate in remainder, was dependent on an estate for years, livery of seisin must be made to the tenant for years, to pass the freehold to the remainder man. The tenant for years, on this principle is not said to be seized of land, he has no property in the soil, he has nothing but a right to use and improve for a certain term, which is called his interest in the term. This gives him a right of entry upon the land. And then he becomes possessed of the term for years. The legal seisin remaining in the proprietor in fee. Hence the word term not only signifies the time of the lease, but the interest of the lessee.

By the common law, the actual entry of the lessee was deemed necessary to render the lease compleat : but this is unnecessary by our laws ; and as soon as the lessee has obtained a lease, he there-

by acquires the right of entry, in case the lessor be in possession, or has the right of entry.

Every estate for years, by whatever words created, must have a certain, a determinate period to commence and terminate. There must therefore at the time of making the lease, be some time ascertained by the express agreement of the parties, or a reference to some collateral act reducible to a certainty, which will fix the commencement and termination of the estate, or it will be void. Thus a lease to one person for so many years as another shall live, is void, for the term is uncertain, and can never be reduced to a certainty during the time of the lease : but a lease for so many years, as a particular person shall name, is good, because when he has named the number of years, the period is certain, and he is referred to by the parties, as the collateral thing to ascertain the period. A lease for twenty years, if a particular person named shall live so long, is good, because here is a certain period determined, beyond which the lease cannot possibly extend, tho it may cease at an earlier period, upon the death of the person named. If a lease have a false or impossible date, or no date, it takes effect from the delivery ; but where the time limited for its commencement is uncertain, it is void.

In respect to the incidents of this species of estate, it is clear, that all lessees for years, as well as proprietors in fee, and freeholders, may make leases for years. A lessee for years may assign or grant over the whole of his interest in a term, or he may grant it for a less number of years than he holds it, and such leases are called derivative leases : and such derivative lessee, is compellable to pay rent, and perform covenants according to the terms agreed in such grant, or assignment.

As to emblements, or the profits of lands sowed, or planted by the tenant for years, the general rule is, that where the expiration of the term depends upon a certainty, the lessee can take no benefit after the expiration of the lease, of any labour done before that time. If a man has a lease for a year, commencing and expiring on the first day of April, if he sow winter grain within the year, he shall have no right to reap it after the end of his term. For it

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is the folly of the lessee to sow or plant when his term must certainly cease before he can reap. So if the term cease by any act of the lessee, he is not entitled to the emblements. But if the continuance of the lease be dependent on any contingency, and this happens after the crop is sown, and before it is ripe, the lessee, or his representatives shall have the emblements.

A question has been agitated, whether the common law respecting emblements, where the termination of the lease depends upon a certainty, is obligatory in this state. It has been contended that in leases for years, which have generally been for short terms in this state, that it is the common understanding of the parties, that the lessee shall have liberty to sow winter grain, and reap it the season after the expiration of the lease, and that this is a reasonable construction in order to enable the lessee to take the full annual benefit of a farm. In making a lease, it is easy for the parties to make provision in this respect, by which the lessee may remove all doubts, and be secured in every right intended to be conveyed to him. But to admit such a construction respecting leases for years as has been insisted on, would be productive of the most dangerous consequences. It subverts an ancient and long established maxim of the common law, it destroys the express agreement of the parties, and admits of a construction of a lease, repugnant to the words of it. It render all contracts of this nature perfectly uncertain, because by this construction, it cannot be determined how much the lessee for years, may sow the last year of his lease, it may therefore be in his power to take the use of the land for the year after the expiration of the lease. To admit a construction of law subversive of the principles of contracts, is beyond the power of any court. As the common law respecting emblements, is founded in reason, and correspondent to the fundamental rules of contracts, it must be deemed obligatory in this state.

Tenant for years, is not not by the common law impeachable for waste. He has therefore all the power to do waste upon land, as a proprietor in fee, unless specially restricted by some clause in the lease. It is usual to restrict the tenant, to use and improve the premises according to the rules of good husbandry. This may  
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be considered merely as a prohibition to commit waste, and leaves the tenant all the power given to tenants in dower.

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CHAPTER TENTH.

OF ESTATES AT WILL, AND BY SUFFERANCE.

I. <sup>3</sup>ESTATES at will, are where the tenant has the use and improvement of the lands during the will of the lessor. When the tenant has obtained the possession of the lands, he acquires an uncertain and defeasible estate, and is liable to be turned out of possession whenever the proprietor pleases. The tenant has the same power to determine the estate, as the proprietor, the estate being dependent on the will of lessor and lessee. The tenant shall not be prejudiced by any sudden determination of the estate by the lessor. For if the tenant sows, and the lessor before the corn is ripe, or before it is reaped, determines the estate and puts him out, yet the lessee shall have the emblements, and liberty to enter upon the land, to cut and carry them away. This is allowed on account of the uncertainty of the estate, for the tenant could not possibly foreknow when the landlord would determine the estate. As he could not guard against such an event, he shall not be prejudiced by it, but shall have the profits of the crop. Upon the same principles, the tenant after the determination of the estate, by the will of the lessor, shall have liberty of ingress and egress to fetch away his goods. But where the tenant by his own will determines the estate, he forfeits the emblements.

An estate at will may be determined by the express declaration of the lessor, of which he must give notice to the lessee, or by entering upon and taking possession of the land, or by giving a deed or lease for years, to commence immediately, or by the desertion of the tenant, his making an assignment of the estate to another, or by his committing waste. And last of all the death of either party, is a determination of the estate.

II. Estates at sufferance are, where the tenant gains possession of lands, by a legal title, and then continues his possession after his

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*g* 2 Black. Com. 145. Co. Lit. 55. *h* 2 Black. Com. 150. Co. Lit. 57.

legal title has expired without any title. Thus where a man has a lease for years, or is tenant at will, and holds possession of the lands after the determination of the estate, without any licence from the owner, or any contract made with him, he is called a tenant at sufferance. By the common law of England, such an estate may be destroyed by the entry of the owner, and without such entry he cannot maintain trespass against the tenant at sufferance, as he might against a stranger; for his title having once been lawful, he shall never be called a trespasser till the owner by some public act shall declare his possession to be wrongful. But in this state, who ever holds lands after the determination of his estate, is considered as a trespasser, and as such may be sued and removed out of possession without any previous entry by the owner.

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#### CHAPTER ELEVENTH.

##### OF ESTATES UPON CONDITION.

**E**STATES upon condition, are more properly qualifications of other estates, than a distinct species, as they may be had in several kinds of estate already described.

i An estate upon condition may be defined to be where in the grant of the estate of whatever kind, there is expressed, or annexed some condition or qualification, by which the estate shall commence, be enlarged or defeated, upon the performance, or breach of such condition or qualification. These conditions may be either precedent or subsequent. Conditions precedent, are such as must be fulfilled and complied with before the estate can vest or be enlarged. For instance, if an estate be given to a person upon condition that he marry a certain woman, the condition is precedent and must be performed, before the estate can vest. Conditions subsequent, are such by the failure, or non-performance of which an estate already vested may be defeated. Thus if one grant an estate to another upon condition, that he pay an hundred pounds in one year, the estate is dependent upon the subsequent condition of paying such sum of money, and on failure of performing the condition, the estate will be defeated. So if an estate be granted to



a widow during her widowhood, if she marries, the estate is defeated.

But a material distinction is made between a *condition in deed*, and a *limitation*. When an estate by the words that create it, is so limited, that it cannot endure beyond the time when the contingency happens, on which it is to fail, this is called a limitation. Thus where lands are granted to a person so long as he holds a certain office, or while he remains unmarried, or until the rents amount to a specific sum, these are all limitations, and as soon as the contingencies happen, the several conditional estates cease, and the subsequent estate which depended on such determination, become immediately vested without any act to be done by him who is next in expectancy.

But when an estate is, strictly speaking upon a condition in deed, as where it is granted upon condition to be void upon payment of a certain sum of money, or on failure of paying a certain rent, or so, that the grantee continues unmarried, or provided he goes to York, the law permits it to endure beyond the time when such contingency happen, unless the grantor, or his heirs, or his assigns take advantage of the breach of the condition, and make either an entry or claim in order to avoid the estate. Thus, if a lease be made on conditon to be void, if rent be in arrear for a certain time, and that the lessor may re-enter: yet if the rent be in arrear, if the lessor do not re-enter, and the lessee afterwards pays up the rent, and the lessor accepts it, the lease remains valid. Conditions can only be reserved to the feoffor, donor, or lessor, and their heirs, and not to a stranger. Therefore when the words creating an estate, strictly import a condition, yet if on a breach of the condition, the estate be limited over to a third person, the law construes it into a limitation, and not a condition: because it is not in the power of the person, to whom it is limited, to avoid the conditional estate by entry, and it would be in the power of the persons who have no interest in the estate, to preserve or destroy it. So if a man devises estate to his heir at law, on condition that he pays a sum of money, and on failure, devises it over to another; if the heir refuses to pay the money, it shall be considered as a limitation, and the estate shall vest in the other person to whom

whom it was devised without entry, because no person but the heir, can by law make the entry.

In all instances of limitations, or conditions subsequent, so long as the conditions remain unbroken, the grantee has an estate of freehold, or for years, according to the nature of the estate that was granted : for while the grantee preserves the conditions on which he holds the estate inviolate, the law contemplates him as holding an absolute estate.

These conditions, if they be impossible at the time when they are made, or become so afterwards by the act of God, or by the act of the grantor himself, or if they are against law, or inconsistent with, or contradictory to the nature of the estate, they are void. If such conditions are precedent, and necessary to be performed before the estate can vest, the grant is void : but if the conditions be subsequent the estate instantly vests in the grantee, as tho no condition had been annexed : For the estate having once vested by the grant, it can never afterwards be defeated by a condition, either impossible, illegal or repugnant.

There are but few instances of conditional estates, excepting where lands are conveyed as pledges, to secure some debt or duty : these are living pledges, and dead pledges, or mortgages.

1. A living pledge, is where a man borrows money of another, and grants him an estate to hold, till the rents and profits repay the sum borrowed. The estate is conditioned to be void, as soon as the sum borrowed shall be raised. The land or pledge is said to be living, because it subsists and survives the debt, and on discharge of it, immediately results back to the borrower. This mode of pledging estates, is rarely used, while mortgages are very common.

2. A dead pledge, or mortgage, is where a person to secure a debt which he owes, or money which he has borrowed, makes to his creditor an absolute conveyance of lands, and annexes a condition, that on paying the sum due, within a limited time, the deed shall be void, but on failure to be absolute. The person executing such conditional deed, is called mortgagor, and the person receiving

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1 2 Black. Com. 157. Co. Lit. 205. 1 2 Black. Com. 158.

ing it, mortgagee. The mortgagee immediately becomes vested with the legal title to the estate, defeasible upon performing the condition, by the payment of the money due. He may go into possession of the lands, unless restrained by some special agreement ; but is liable to be dispossessed upon the payment of the mortgaged money at the day limited, but the usual practice is to suffer the mortgagor to continue in possession till the time of payment be elapsed. If the money be not paid by the limited time the mortgagee becomes vested with an estate absolute and indefeasible at law. But here equity interposes, and secures to the mortgagor a right to redeem the lands pledged upon payment of what is justly due. This subject however, more properly belongs to that branch of our enquiries, where we treat of the powers of courts of equity. It is sufficient for us in this place to consider mortgages as far as they are regulated by law.—In treating upon equity, we shall resume this subject, and handle it with a minuteness correspondent to its importance.

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#### CHAPTER TWELFTH.

#### OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

**E**STATES are said to be either in possession, or expectancy.—The former are those about which our enquiries have been principally concerned : for when we were contemplating estates, it was necessary to direct our attention to those which in fact existed, and not to those which are to exist in future. Nothing therefore can be particularly observed upon such estates. This chapter will comprehend estates in expectancy, that will exist in future : which are of two kinds, the one called a remainder, and the other a reversion. This brings us to that part of our disquisitions that relate to the time of the enjoyment of estates.

The laws respecting estates in expectancy, being very abstruse and intricate, and such kind of estates not being very common in this state, it will be unnecessary to enter into a minute discussion of the

the subject : but as this branch of our jurisprudence, is necessary to be known, I shall extract a concise view of it, from the commentaries of judge Blackstone.

I. = An estate in remainder is defined to be an estate limited, to commence and take effect after another particular estate is ended, and determined. Thus, a proprietor in fee conveys lands to one person for twenty years, and after that term expires, to another and his heirs forever, or to one person during life, and then to his heirs forever. Here the first persons to whom these lands are given are tenants for years, or for life, and the remainder is to the other persons, or their heirs in fee.

A person may limit a hundred remainders, or as many as he pleases upon the same estate, but they must be to persons that are in life, or to the immediate heirs of such as are in life, so as to avoid a perpetuity, which the law will not warrant. No remainder can be limited after the grant of an estate in fee-simple, for this comprehends the whole of the estate.

It is a general rule respecting these estates, that there must be some particular estate for life, or for years, precedent to the estate in remainder, in order to support it, and that any thing which defeats the precedent estate, created to support the remainder, will defeat the remainder.

Another general rule is, that the estate in remainder must pass out of the grantor, at the same time that the particular precedent estate is created. Thus an estate granted to one for life, and then to another, and his heirs forever, the estate in the remainder, passes out of the grantor at the same time the estate for life is created, and vests presently in the remainder-man ; tho to be possessed and improved in future, and the remainder-man, may transfer such estate in remainder.

A third rule respecting estates in remainder is, that they must vest in the remainder-man during the particular precedent estate, or at the instant it determines. Thus, if an estate be granted to one person for life, and then to the eldest son of another in fee,

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if the tenant for life die, before the other person has a son born, the remainder is gone, and tho he afterwards have a son, he cannot take by the grant, for the particular estate, that supported the remainder, having ceased before his birth, the remainder falls to the ground, and the estate reverts to the grantor, or his heirs.

On these rules, it is said, that the doctrine of contingent remainders depends. Remainders are either vested, or contingent. Vested remainders, or remainders executed, are where a precedent interest immediately vests, tho to be enjoyed in future, being fixed with certainty, to a determinate person, after the particular estate is ended. Thus if one person be tenant for life, remainder to another in fee, the last man has a vested remainder. Contingent, or executory remainders pass no present interest, and are where the estate in remainder is limited to commence, and vest either in a dubious or uncertain person or upon a dubious, and uncertain event, whereby the precedent estate may happen to be determined, and the remainder be wholly defeated, and never take effect. Thus where a person is tenant for life, with remainder to the eldest son of another person, then unborn, this remainder is contingent, for it is uncertain whether such person will ever be born; but whenever such son is born, the remainder instantly vests, and is no longer a contingent, but a vested remainder: tho if such son should not be born, till after the particular estate is determined, the remainder would be defeated. These remainders must be limited to some persons that may by possibility be in existence before the particular estate ends; for where the possibility is very remote, depending upon two, or more contingencies, the remainder is void.

A remainder is also said to be contingent, where the person is fixed, but the event on which he is to take, is uncertain. Thus where an estate is granted to one for life, and another in fee, in case he survives, the remainder depends on the survivorship, and that failing, the remainder is gone.

Contingent remainders of either kind, if they amount to a freehold estate, cannot be limited upon any particular estate less than a freehold, for unless the freehold passes out of the grantor, when the remainder is created, such freehold remainder is void. The remainder

remainder cannot pass without vesting somewhere, it must vest in the particular tenant, or it can vest no where, unless such tenant have an estate of a freehold nature, it cannot vest in him, and if it does not, a freehold cannot be created.

But a species of estates, similar to these, may be created by will without attending to these rules, by reason of the more liberal construction that is given to wills. Such estates, so created by will, are denominated executory devises. An executory devise is defined to be a disposition of lands by will, where no estate vests at the death of the testator, but is to commence on some future contingency. There is no necessity of any particular precedent estate to support an executory devise. As where a man devises lands to a single woman, and her heirs, to take on the day of her marriage, if the woman be unmarried at the time of the decease of the testator, the estate descends to his lawful heirs in fee, and so continues till the woman be married, and then it vests in her. This limitation of the estate, would be void in a deed, but is good in a will, because, by a devise a freehold estate can pass without delivery of possession, and may commence in future.

An executory devise of an estate in fee-simple, or other less estate may be limited after an estate in fee. A man may devise his whole estate in fee, and then limit a remainder, to take effect on a future contingency. Thus if a man devises his estate to one and his heirs, and if he dies before a certain age, then to another and his heirs, this remainder is good, by way of executory devise, but would be void in a deed. But the contingencies, must be such as will happen in a reasonable time, and not amount to a perpetuity.

By an executory devise, a term for years may be given to one man during life, and a remainder, be limited over to another, which cannot be done by deed, for a life estate being deemed larger than any estate for years, a deed of a life estate is supposed to comprehend the whole term, but in consequence of the liberal construction that is given to wills, a man may in cases of long terms, devise an estate for life and limit a remainder. The Devisor in such cases may limit as many remainders as he pleases, but the persons must all be in esse during the life of the first devisee, for then the candles are all lighted, and are consuming together,  
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and the ultimate remainder is in reality only to that remainderman, who happens to survive the rest, or such remainder must be limited to take effect upon such contingency only, as must happen, if at all during the life of the first devisee.

II. Estates in reversion, result from the operation of law, and are defined to be the residue of the estate left in the grantor, to commence in possession, after the determination of some particular estate granted out by him. Thus when a man grants an estate for life, for years, or at will, the reversion continues in the grantor, and instantly takes effect upon the expiration of such estates so granted. For it is an established doctrine of law, that the fee-simple of all lands must abide somewhere, and if he who has the whole carves out a smaller estate, whatever is not granted, remains in him. Estates in fee-tail, on failure of persons to whom they are limited, revert to the donor. Estates in reversion, as well as remainder, are transferable.

It is a general rule of law, that whenever a greater and less estate meet, and unite in the same person, without any intermediate estate, the less is immediately annihilated, and merged or sunk in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall exist no more. But where the person holds the estates by different rights, they shall continue distinct and shall not merge. Thus if a person has a freehold in his own right, and a term for years, in another's right, no merger of these estates can take place. But estates in tail, are an exception to this rule; for if a person, who may be called the first donee in tail, should purchase the reversion in fee, of the donor, yet the estate tail shall not merge; because by the statute it was intended, that the first donee should do no act, by which it should be in his power to defeat the estate-tail.

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## CHAPTER THIRTEENTH.

## OF ESTATES IN SEVERALTY, JOINT-TENANCY, CO-PARCENARY, AND COMMON.

**T**HIS chapter considers the number and connexion of the owners of estates.

I. Estates in severalty, are where one person is the sole owner, without any connexion with any other person. This is the most common kind of estates, and it is this we mean, when we speak of estates in general. When we intend any other kind, it is particularly mentioned by way of distinction. Nothing further need be observed on this head. We proceed to a consideration of the other species of estates.

II. \* An estate in joint-tenancy, is where lands are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will. The creation of this estate depends upon the expressions in the deed, or devise, by which the tenants hold, for it results from the acts of the parties, and not from the operation of law. Thus an estate given to a number of persons, without any restrictive, exclusive, or explanatory words, will be construed a joint-tenancy; for every part of the grant can take effect only by considering the estate equal in all, and the union of their names, gives them a union in every respect.

The *proprieties* of this estate arise from its unity, for it is essential that joint-tenants have unity of interest, of title, of time, and of possession. The unity of interest extends to the same period of time, for its duration, and the same quantity of interest, and a difference in either is inconsistent with a joint estate. The unity of title, consists in the estate being created by and derived from one and the same conveyance. The unity of time consists in the estates being created and vested in all at the same period; and the unity of possession, makes it necessary that all should possess at the same time; for they have not a divided possession, one having the possession of one part, and another of a different part, but each has the entire possession of every parcel as well as of the whole, and they are said to be seized \* by the half or moiety, and by the whole.

\* 2. Black Com 179. Co. Lit. 189. \* Per mie et per tout.

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The *incidents* to joint estates are, that the act of each tenant, in many cases is considered as the act of the whole. A verbal lease, by one, reserving rent to himself, shall enure to the benefit of all. The surrender of a lease to one, that was given by all, shall enure to the benefit of all. Delivery of possession to one, or an entry or re-entry by one, has the same operation, the possession of one, is the possession of all, so as to prevent either from gaining a title by the possession of fifteen years. So if either of the joint-tenants come within the descriptions of the saving clause of the statute, respecting the possession of lands, he saves the estate for all. They cannot sue or be sued without joining or being joined in the suit, in all actions that relate to the joint estate. One joint-tenant, cannot maintain an action of trespass against another, in respect of the land, for each has an equal right to enter upon any part of it. But one joint-tenant, has not the power by himself, to do any act which may defeat the estate of the other, as to lease the land, so as to prevent the other from possessing and improving. If one joint-tenant commit waste which tends to the destruction of the inheritance, no action lies at common law. No action of account lies at common law in favour of one joint-tenant, against another, unless he had constituted him his bailiff and receiver. <sup>p</sup> But now by statute, an action of account lies in favour of one joint-tenant, his executors or administrators, against another, and his executors and administrators, as bailiffs and receivers, to render their reasonable account, for the use and profits of the joint estate, that have been taken, more than their proportion.

In England on the death of either of the joint-tenants, his right remains, and goes to the surviving tenants. But in this state we have never adopted this odious and unjust doctrine of survivorship, but on the decease of one of the joint-tenants, his share descends to his heirs.

These estates may be severed, or destroyed by the act of the parties in making a voluntary partition of the land. By the common law one joint-tenant cannot compel his fellows to make partition, <sup>q</sup> but by statute partition can be enforced by an action, or writ of partition where the partners cannot agree among them-

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<sup>p</sup> Statute, 12.

<sup>q</sup> Ibid. 116.

**Selves.** The death or alienation of one of the tenants sever the joint-estate, and reduce it to a tenancy in common.

III. An estate in coparcenary is where lands of inheritance descend from the ancestor, to two, or more females his daughters, sisters, aunts, cousins, or their representatives in equal shares, there being no male heirs : in such cases they are called co-parceners, or for brevity's sake parceners. This species of estate seems to have been introduced into England on this account. The general law there is, that if there be sons, the eldest shall inherit the whole lands : but if there be daughters they shall inherit equally, and to distinguish this species of estates they have called female heirs, parceners. But in this state we have not in reality any occasion to make this distinction, for by our laws all male, and female heirs in the same degree inherit alike, and if there be male and female or female heirs only, the statute law has provided for the distribution of the estate by the order of the court of probate. In all cases where lands descend to a number of heirs, such heirs may be considered as joint tenants, or tenants in common till the distribution, of the estate takes place, and in case of a number of female heirs, if they do not proceed to a distribution, pursuant to the statute, they may be called parceners, but have the same essential relation to each other as joint-tenants ; there being only a nominal distinction, as they inherit the estate, and it may vest in them at different periods, but cannot be done in joint-estates.

Parceners have the same unity of interest, title, and possession as joint-tenants. They must sue and be sued jointly in all matters respecting their own lands ; and the entry and possession of one, enures to the benefit of all, in the same manner as in the case of joint-tenants. They cannot maintain actions of trespass or waste against each other. In England the doctrine of survivorship is not admitted, because they are not considered as possessed of an entirety, but a distinct moiety of the estate. At the common law, account will not lie in favor of one parcener against another, but by our statute law this action lies in favor of one parcener, her executors and administrators against another parcener, and her executors and administrators, as bailiffs, and receivers for

the rents, and profits of the land, where they have received more than their just proportion.

By the common law, and also by the statute law, parceners may compel a partition of their estates by action of partition. They may dissolve the estate by voluntary partition, alienation, or by vesting the whole in one person, which reduces it to an estate in severalty.

IV. *f* Estates in common are where several persons hold by several and distinct titles, but by unity of possession, for the separate estate of each, not being ascertained they must all improve together. Unity of possession is essential to constitute this estate. But the quantity of interest, the manner in which the title is derived, and the time of enjoyment may be totally different, one may have a freehold interest, another an estate for years, one may derive his title by descent, and another by purchase, and if there be a unity of possession, it constitutes an estate in common.

Where an estate by our law descends to a number of heirs in equal shares, (as is the case in all descents of lands, the owner dying intestate leaving a number of children,) the heirs have an estate attended with all the properties of a joint-tenancy; for there is unity of time, interest, title, and possession, but as they derive their title by descent, which is repugnant to the nature of a joint estate, they must be considered as tenants in common, and by our law an estate in common, in such cases, may contain all the unities of a joint estate.

Estates in common may be created by a dissolution of estates in joint-tenancy and coparcenary, where the unity of possession is left. Thus if there be two joint-tenants or parceners, and one aliens his right, the other joint-tenant, or parcener and the alienor are tenants in common. This destroys that unity which constitutes the former estates, and of course they are changed into estates in common. Estates in common may be expressly created by deed. Thus where an estate is given to two, to be holden one moiety by one, and the other moiety by the other, it is a tenancy in common, because joint-tenants do not have distinct moieties. A devise to

two

two persons to hold jointly and severally, is a joint estate. An estate granted to two persons, to be equally to be holden between them, in deeds, is said to be a joint estate, and in wills a common estate ; but the safest method is to declare by express words in the deeds or wills, the kind of estate intended to be created.

By the law of England, the right of survivorship, does not take place in estates in common. By the common law, tenants in common must join in all personal actions, where the profits of the land or some entire indivisible things are in question, as in actions of trespass against strangers : but in all real actions where the realty, or title of the land is concerned, they must bring several actions, as in cases of disseisin—because the possession only is joint, and not the title. If an action be brought by a tenant in common, when all ought to join, the defendant can take advantage only by a plea in abatement. Actions of waste and account do not at common law lie in favour of one tenant in common, against another, but account lies by the statute law. If one tenant in common disseise, or eject another, the tenant so disseised, may have an action of disseisin against the ejector. But then it must be an actual disseisin, as turning him out, and hindering him from entering, and a bare perception of the profits will not be enough.

Estates in common may be dissolved by uniting all the titles and interests in one tenant, by purchase or otherwise, or by voluntary partition. The statute law authorises a compulsory partition by action or writ of partition.

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#### CHAPTER FOURTEENTH.

#### OF TITLE TO THINGS REAL IN GENERAL.

**I**N the preceding part of this book, we have considered the nature of things real, the manner of holding them, and the different kinds of estates that may be had in them. We come now to consider the title to things real, with the manner of acquiring and losing it.

The nature of our general title to things was explained in the first chapter of this book. We are now to contemplate the title of individuals to lands in virtue of positive laws. A title may be defined to be a just right, which a certain man has according to the rules of positive law, to enter upon, possess, occupy, and take the benefit of a particular tract of land, in preference to, and in exclusion of the rest of mankind. There are however several degrees in which sundry persons may have a kind of right to lands, which must be considered to form an idea of a complete title to lands.

1. The naked possession, or actual occupation of lands without any color of right, is the lowest degree of title. Such is the case with all disseisors, who by force, or surprise turn the owners out of the possession of their lands, and obtain the possession; or who by any method whatever, obtain the actual occupation of lands, which are owned by other persons. In all these instances, the disseisor has nothing but the naked possession, is a trespasser, and may be removed by the proprietor, at any time within fifteen years: but if he neglect to make his entry, keep up his claim, or bring his action within fifteen years, the disseisor acquires an absolute indefeasible title. Such disseisor may hold possession of the lands against all persons, but the lawful proprietor.

2. While the disseisor has the actual possession of the lands, the disseisor has the *right of possession*, and the *right of property*, between which there is no distinction by our law. The lawful proprietor may at any time within fifteen years, maintain an action of trespass against the disseisor, may enter upon, and take possession of the lands, or may remove him by an action of disseisin, and thus extinguish his possessory title. When the person who has the right of possession and property, obtains the actual possession of the lands, he establishes a complete title.

3. For by our law to constitute a perfect title to lands, it is essential, that there be a conjunction of the right of possession and property, with the actual possession. When this union is completed, the title is firm, permanent and established, and the proprietor

prietor may dispose of it as he pleases, and may hold, possess and improve, to the exclusion of all the rest of the world.

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 CHAPTER FIFTEENTH.

## OF TITLE BY DESCENT.

**W**E have considered the different kinds of estates in things real and the requisites to constitute a general title. We now proceed to a contemplation of the particular titles to lands.

There are but two methods by which a title to real estates can be acquired. *Descent*, where the title results from the operation of law, and *purchase* where the title is acquired by the act and agreement of the parties. This chapter will be devoted to a particular investigation and illustration of the law, respecting the acquisition of property by descent.

\* Descent, or hereditary succession, is the title by which a man on the death of his ancestor or other relations acquire his estate by right of representation, as his heir at law. An heir therefore is the person on whom the estate devolves by force of law, on the death of the ancestor : and all such estates thus descending to the heir are called inheritances. To elucidate the doctrine of descent it is necessary to exhibit a concise view of the nature of kindred and the several degrees of consanguinity, or alliance by blood.

Consanguinity is defined to be the relation subsisting between all the different persons, that descend from the same stock or common ancestor. Some portion of the blood of the common ancestor flows into the veins of all his descendants, and tho mixed with the blood flowing from a thousand other families, yet it constitutes the kindred or alliance by blood, between each individual, this relation by blood has two divisions. Lineal consanguinity, and collateral, or transversal consanguinity. We shall first explain lineal consanguinity. This is that relation which exists between persons where one is descended from the other, as between the son, the father, the grandfather, the great-grandfather, and so upwards in a direct ascending line, or between the father, the son, the grandson, the great-grandson, and so downwards in a direct descending line.

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Every generation in this direct course, makes a degree of consanguinity, computing either in the ascending or descending line.— This being the natural method of computing the degrees of lineal consanguinity, it has been adopted by the canon, the imperial, and the common law.

y It is remarked by judge Blackstone in his commentaries on the laws of England, to be astonishing to consider the number of lineal ancestors, which a man has in a few degrees, and that he is said to contain as many bloods in his veins, as he has lineal ancestors; that he has two in the first degree, his own parents, four in the second, his grand parents, eight in the third, his great-grand-parents, and so on, doubling the number at every degree, which by the rule of geometrical progression, demonstrates, that there are a thousand and twenty-four lineal ancestors, in the tenth degree, and more than a million in the twentieth. To pursue this calculation upon the same principles, through as many generations as have passed away since the creation of the *first pair*, would extend the number of our lineal ancestors infinitely beyond all human conception. But we have the authority of revelation to assure us, that in the origin of the world, one pair only was created, and that from them has sprung the whole race of mankind. We must therefore, in making our calculations upon these principles, take into consideration the circumstance, that in some stage of our calculation, we must begin to lessen our number of lineal ancestors, for the purpose of uniting in our descent from the original parent of the human race. The slightest observation will shew, that there is a constant intermarriage between relations in degrees not very remote, by which the number of lineal ancestors are diminished, in a manner not capable of calculation. So that a whole country in tracing their progress through a few ages, will find, they all descended originally from a few families. America furnishes a most illustrious example, to demonstrate this fact. From a few thousand persons, who first emigrated into this country, a wide extended continent has been peopled in less than two centuries.— Much the greatest part of the inhabitants now living in the United States, must trace their lineal ancestry through the first emigrants.

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The rule of geometrical progression, would be mathematically true, if there were no intermarriages between relations in any, even the remotest degrees; but when we consider the constant intermarriage of relations, which necessarily took place for the original propagation of the human race, and which must now take place for their preservation, it is evident that this rule in no measure, ascertains the actual number of our lineal ancestors, even in degrees not very remote, and that it is wide of the truth, to say, that a man has as many different bloods in his veins, as he has lineal ancestors, by the rule of geometrical progression, as adopted by Blackstone.

Collateral, or transversal consanguinity, is a relation subsisting between persons that descend from the same common ancestor, but not from each other. It is essential to constitute this relation, that they all spring from the same common root or stock, but in different branches. Thus if John Stiles have two sons, and they both have issue the children of both are lineally descended from John Stiles, as their common ancestor, but they are related to each other by collateral consanguinity, because they have not descended lineally from each other, but collaterally from the same common ancestor.

From this representation of transversal kindred, it is very easy to conceive, that from each ancestor which a person has, there is issuing a race of collateral kinsmen, and that the number of them in the various degrees in which they stand related, must be beyond all conception.

Hereditary succession among collateral relations, is the most difficult to be ascertained. It is therefore necessary to illustrate the mode by which the degrees in this kind of consanguinity are computed. The method adopted by the canon law and the common law of England is this. Having discovered the common ancestor, to begin with him, and reckon downwards, and the degree the two persons, or most remote of them is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them, there is but one degree. An uncle and nephew,

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are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and the same rule of computation is extended to the remotest degrees of collateral relations.

The method adopted by the civil, or imperial law, is this, to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree from each person, both ascending and descending, and the number of degrees they are distant from each other, is the degree in which they stand related. Thus from a nephew to his father, is one degree, to the grand-father, two degrees, and then to the uncle three, which points out their relationship. Thus if John Stiles's two sons have each a son, they are related to each other in the fourth degree : for we must compute from one of the grandsons to the father, then to the grand father, then descend to the father of the other, and then to him, which makes four degrees : but according to the other method, they are related in the second degree.

It is however immaterial which mode of computation is adopted, for both will establish the same person to be the heir. As the imperial mode points out the actual distance between the persons in question, and as our estates descend nearly according to the Roman law, there seems to be a propriety in making our computations according to that mode. Nor is it probable, that the mode according to the canon law had ever been introduced, had it not been calculated to answer an important purpose for the canonists. The prohibition of marriage originally extended to the third degree of consanguinity, according to the imperial mode of computation. The profits of granting dispensations to persons to marry within the prohibited degrees, was an object to the papal power, and the introduction of the mode of computation by the canon law, which extends the prohibition to the sixth degree, comprehended many more subjects for dispensation, than the mode before adopted, and poured a rich stream of wealth into the treasury of God's vicegerent.

Having

Having thus concisely explained the nature of consanguinity and the mode of ascertaining the degrees of kindred, I proceed to lay down the rules by which the succession to estates is determined. \* The rules of descent are established by the statute concerning testate and intestate estates. An explanation and illustration of the principles contained in this statute, and the consequences resulting from them, is all that is necessary to complete this branch of our enquiries.

I. The first general rule is, that estates of inheritance where the proprietor dies intestate, leaving children, shall descend to them all, in equal shares, whether sons or daughters.

A posthumous child, or one born after the death of the intestate, will take with the other children ; for the estate will vest in the child in the mother's womb, or as the law calls it, in ventre sa mere.

This comprehends all estates to which the intestate had the right of possession, as well as the right, and actual possession : but an exception is made to the general rule, where any of the children have had any estate by way of settlement, from the intestate in his life time, equal to the shares of the other children : but if the estate advanced by settlement be not equal to the shares of the rest, then such proportion shall be allowed them, as will make all their shares equal. The widow of the intestate, if he leaves any, is entitled by way of dower, unless endowed before marriage, to the use, and improvement of one third part of the real estate during her life ; and at her decease, the same is to be divided in the same manner as the rest of the estate, if it be undivided at that time.

As the statute respecting descents comprehends real, as well as personal estate, there is a provision that in the distribution of the estate, that the male heirs shall have their parts in real estate as far as the estate will allow. So where a division of an estate in houses and lands will be of great prejudice and inconvenience, the court of probate may direct that the eldest, or on his refusal either of the rest, if they consent, may take the whole at the appraisal of indifferent men, under oath, and pay, or secure to each, their proportion in a reasonable time.

This rule is very different from the English law, where the eldest son only inherits, and the daughters never, unless there be a failure of males. This feudal idea respecting descents, was disregarded by our ancestors, when they formed their code of laws : but their reverence for the bible, and probably some prejudice remaining in favor of the principle of keeping up families, by aggrandizing the eldest son, induced them to copy from the law of Moses, that regulation which confers on the eldest son a double portion. But this principle appears manifestly unwarrantable, when it is considered that all the children of the intestate have by nature equal claims upon his estate, without distinction of age or sex, and that there is no particular necessity existing, which requires that the eldest son should have a larger portion of the estate of the father, than the youngest. In the year 1792, this part of the law was repealed, and all the children placed upon the same footing.

II. The second general rule is, that where any, or all of the children are dead, the estate shall descend to their legal representatives. If one son be dead, leaving two or more children, they shall stand in the place of their father, and by the right of representation, inherit that portion of the estate to which he would have been entitled had he been living. If all the children be dead, each leaving a number of children, the children of each, being the grandchildren of the intestate, shall represent their respective parents, and inherit their portions. The estate therefore must be divided into as many equal shares, as the intestate left children, and the issue of each child will take that portion, which would have belonged to him, had he been living, to be divided equally among them. If each child should leave a different number of children, yet the branches of each stock, the children of each child, take what would have been the share of the parent, and the estate is not to be equally divided among all the grand-children, without any reference to their parents. In the last case, suppose one of the grand-children dies before the intestate, leaving issue, such issue will stand in the place of the parent, and be entitled to his share.

This inheriting by the right of representation, is also called a succession *per stirpes*, according to the roots, because all the branches

thes inherit the same share, that their root whom they represent would have done. Thus in the last mentioned case, all the grand-children of each particular child, being the branches, are entitled to receive the same portion of the estate, which their parents, being the roots, would have done had they been living. If the estate should be divided equally among all the grand-children, without any reference to the stock, from whence they sprung, it would be a succession *per capita*, according to the heads. It is a general rule that the lineal descendants of any person deceased, shall represent their ancestor in infinitum, and stand in the same place as he would have done had he been living. The right of representation continues without limitation in the descending line, and the inheritance descends *in stirpes* according to the roots. If one of three sons die, leaving six children, and then the father die, the two surviving children will take each one third part of the estate, and the other third part will remain to the six grand-children.

III. The third general rule is, that on failure of children, or lineal descendants of the intestate, the inheritance, if derived by descent, gift, or devise, from the parent, ancestor, or other kindred of the intestate, shall descend in equal shares to his brothers and sisters, and those who legally represent them, of the blood of the person or ancestor from whom such estate came or descended.

We now are to consider the descent of lands among collateral relations. The law has pointed out two modes, of collateral descent, according to the different modes, by which lands can be acquired. We are first to consider the descent of lands, that were derived to the intestate from some of his kindred, by descent, gift or devise. In all these instances the person receiving the estate pays no consideration, it is in the nature of a gift, and therefore on failure of his lineal heirs, it appears to be consonant to the principles of equity, that the lands should go to those persons who are of the blood of the relation, from whom they came. It is a fundamental doctrine of the common law of England, that in collateral descents the lands shall go to the relations of the blood of the first purchaser, who is the person from whom the lands are supposed

originally to have descended. On this principle our law has made a distinction in the mode of the descent of lands, that came to a person by descent, gift, or devise, from some kindred; and that are acquired by actual purchase, or by devise, or gift from some stranger; and has adopted the doctrine that lands acquired in the manner now under consideration, shall go to the nearest relations, of the blood of the kindred from whom they were derived. In the application of this general rule, we shall find that in all instances the brothers and sisters of the whole blood of the intestate, shall inherit his estate, that in some instances brothers and sisters of the whole and half blood, will inherit together; that in some instances brothers and sisters of the half blood, will inherit, and in some be excluded, and the estate go to a remote relation in preference to them. Brothers of the whole blood, are where they descend from the same couple of parents; of the half blood, where they have the same father, and two mothers, or the same mother and two fathers. So a kinsman of the whole blood, must be derived not only from the same ancestor, but the same couple of ancestors; but a kinsman of the half blood in the degrees, beyond brothers, is where one of the ancestors in some stage was the same, and the other was not.

All brethren of the whole blood of the intestate, will necessarily be of the whole blood of the relation, from whom the lands came. But suppose John Stiles has four sons, two by a first, and two by a second marriage, and dies, leaving an estate which descended in equal shares to them. If either of the four sons die without issue, the estate which descended from his father, would be equally divided among the surviving brothers of the half as well as the whole blood, because they are all of the blood of the father, from whom the land was derived. But if two of the brothers, by one marriage, should inherit an estate from their mother, and one of them die without issue, then the other brother of the whole blood, only would inherit, because the half blood would not be related to the person, from whom the land came. If the two brothers by one marriage should die without issue, leaving maternal estate, the half brothers could not inherit; but the estate must go to the nearest

nearest maternal relations. If lands should descend, be given or devised to either of the four brothers from a paternal uncle, or any paternal relation, and either die without issue, the land descends equal to his brothers of the whole and half blood : if lands should be thus derived from a maternal uncle, or any maternal relation and either die without issue, his share must go to the uterine brother, or brother of the whole blood, and never to the brother by the father's side. In case of the death of any brother or sister leaving issue, their children shall by the right of representation stand in their stead, and be entitled to their shares. But the right of representation, among collateral heirs, extend no further than the children of brothers and sisters.

IV. The fourth general rule is, that on failure of brothers, or sisters, and their legal representatives, the estate derived to the intestate by descent, gift, or devise from some relation, shall descend to the nearest of kin to the intestate, and of the blood of the ancestor or person from whom it was derived.

The reason of this distinction, respecting descents in our law, seems to be this, that where estates have been derived from some kindred, the heirs of the person from whom they came, have the best title to the reversion, in case of the failure of lineal descendants or brethren of the intestate, and therefore the estate shall descend to them, and not to the general heirs of the intestate, which might carry the estate wholly out of the families from whence it came.

In explanation of this rule, it is only necessary to observe, that we must ascertain the relation from whom the estate came, whether it be father, uncle, cousin, paternal or maternal relation, and then the nearest of kin to the intestate of the blood of such relation, by the mode of computing the degrees heretofore pointed out, is the heir. If no person of the blood of the relation from whom the estate came, can be found, it will not go to any other kindred of the intestate, but will escheat for want of legal heirs. When the stock from whence the degrees of consanguinity are to be computed, is ascertained, the same method is adopted, as in the rules hereafter mentioned, in which this subject will be fully considered. The  
donor

donor can never inherit the estate given by him, if living at the death of the donee, but his parents may in the same manner, as in the cases hereafter mentioned, for the expression of the blood of such person, excludes the person himself.

V. The fifth rule is, that on failure of lineal descendants, the estate acquired by actual purchase, or by the gift or devise of some person, not of kin to the intestate, shall descend in equal shares to his brothers and sisters of the whole blood, and those who legally represent them. But no representatives are admitted among collaterals, after brothers and sisters children. If the intestate, left three brothers they would all inherit equally, if one of the brothers should die before the intestate, leaving children, they would represent their father, and take his share. If all the brothers had died before the intestate, each leaving a different number of children, the succession would be per stirpes, or by the roots, which was adjudged in the following case. \* A person devised a certain portion of his estate, to be divided among his relations, according to the laws of the state of Connecticut, he had five brothers and sisters, who all died previously to the making of the will, each leaving a different number of children. The children of that brother who left the greatest number, claimed a division of the estate per capita, or according to the numbers, that is, share and share alike : that instead of dividing the estate into five equal parts, which was the number of the brothers and sisters of the testator, and distributing each share to the children of the several brothers and sisters, that the estate should be equally divided, among all the children of the brothers and sisters of the intestate, without any regard to the branches of the families. They founded their claim upon the expression in the statute, that on default of parent, brother, or sister, the estate should go equally to the next of kin of the intestate in equal degree, without saying any thing concerning a want of legal representatives ; that there was a failure of the persons described in the statute, that all the children of the brothers and sisters were next of kin in equal degree ; that therefore, they were the persons pointed out by the statute and the will, and ought to share the estate per capita, by heads, that is, share and share alike.—

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On the other side, it was contended that the statute on failure of lineal heirs, directed the estate to descend to the brothers and sisters of the intestate, and their legal representatives; that the children of the five brothers and sisters, represented them and stood in their places, and were entitled to the same shares they would have been, had they been living, and of course, that the succession ought to be by the roots. The court determined, that the distribution of the estate should be by the roots. The only doubt that could be, respecting the construction of the statute, arose from the omission of the words, *legal representatives*, after the words, if their be no parents, brother, or sister, which must be intended and understood to make the statute consistent, and this may be fairly done, for in the former part of the statute, on failure of lineal heirs the estate is to go to the brothers and sisters and their legal representatives.— This is a positive direction, and it will not do to say, that because in making provision for the disposition of estate among remote collateral heirs, there is an omission of mentioning the failure of certain relations already provided for, that therefore the last part of the statute shall repeal the former and prevent the estate from descending to them. It cannot be proper to say, that because the words, legal representatives, were not added after parents, brother, or sister, that therefore, the estate should not descend to the legal representatives of brothers and sisters, by the roots, as the statute had before provided. Indeed the statute in making provision for the descent of estates, to the various degrees of kindred, must in every advance, suppose a failure of the heirs to whom the estate had previously been directed to descend. To admit a different construction, and take away the right of representation, would be to allow the uncles of the intestate to inherit with the nephews, and nieces, because they are all in equal degree.

This decision is opposed to the whole current of British authorities in the construction of the statute of Charles II. for the distribution of personal estate, and from which, this part of our statute is literally copied. <sup>b</sup> The principle which they have adopted is, that where there are several brothers and sisters, and some of them are dead, leaving children, then such children by right of representation, shall stand in the place of their parents, and inherit with

<sup>b</sup> 1 P. Will. 595. 3 Ibid. 50. 2 Vez. 213. 1 Atk. 454, 455.



with their uncles, such part of the estate of the intestate, as their parents would have been entitled to, per stirpes : but if all the brothers and sisters of the intestate are dead at the time of his death, leaving children, that the right of representation does not operate, and such children do not inherit in right of their parents, but as next of kin : in consequence of which, all being in the same degree of kindred, they take equal shares per capita, according to the numbers : and if there are any uncles or aunts alive, they being in the same degree, with the nephews and nieces, they will take equal shares. But if one of the brothers or sisters had been living, then the right of representation might have operated.

The decision of our courts is as correct, and a more just, and equitable construction of the statute, than that of the British courts. The statute intended particularly to mark brothers and sisters, and their legal representatives, as a branch of relations, who were to inherit by force of positive law, and not merely as next of kin.—The estate is therefore given to them collectively. If all the brothers and sisters are alive, they can have no representatives. If any are dead, their children stand in their place and represent them, if all the brothers and sisters are dead, then the estate is given to their children as representatives, by force of which they are to take as standing in the place of their parents, and not by proximity of blood. I can see no reason why, on the death of all the brothers and sisters, their children cannot represent their parents, and take their shares, as well as they can, when only part are dead. The children of the deceased brothers and sisters, are their representatives whether all or part of the brothers and sisters are dead, and it is by the description of legal representatives, that they are to take the estate : and upon legal principles, the grand children might have been admitted by right of representation, had not this been expressly taken away by the statute. I know not by what principle of common sense, or rule of logic, it can be said, that children do not represent their parents, unless some of their uncles are alive. If it is equitable that the children of deceased brothers and sisters, should by right of representation stand in place of their parents, and share the estate of their deceased uncle with their surviving uncles, to the exclusion of the uncles of the intestate, is it not equally right, that

that in case all the brothers and sisters of the intestate are dead leaving children, that such children by right of representation, should take the estate of the intestate, to the exclusion of the uncles to the intestate ?

VI. The sixth general rule is, that on failure of lineal heirs and brothers and sisters, and their legal representatives, the estate acquired by actual purchase or by gift, or devise, from some person not of kin to the intestate, shall go to his parent or parents.

This rule of descent, is warranted by the ideas of mankind on the subject. We feel that there is justice and propriety in giving the estate of a child, dying without issue, and leaving no brethren, to the parents, who have had the care, trouble and expense of his support, in preference to some remote branch of the family, who never have performed such services for the intestate, and probably had no more connexion with him, than with utter strangers. The opposite doctrine of the English law, that estates never should ascend, has ever been complained of as a hardship, and injustice ; and it is a pleasing prospect to observe, that our country has risen superior to the prejudices which are usually entertained in favour of long established institutions, however impolitic, and have adopted rules which are founded in the principles of justice, and the maxims of good policy.

If the father, and mother be living, the estate will ascend to them and they will take as joint-tenants. If either be dead, the survivor will take the whole.

VII. The seventh rule is, that where there are no lineal descendants or brothers and sisters, or their legal representatives of the whole blood, or parents, then the estate acquired as mentioned in the last rule, shall descend to the brothers and sisters of the intestate of the half blood, and their legal representatives.

By the English law, estates descend to collateral relations, in the remotest degree, in preference to the brother of the half blood. The hardship and injustice of this regulation, has been the subject of much censure and disapprobation, and Blackstone, whose partiality for the English law is very great, cannot justify it, even upon

feudal principles. It is much more natural and easy, for legislators who are framing new systems, to avoid the errors that have been interwoven into preceeding systems, than it is to correct old errors which have grown venerable by the lapse of time. The English Parliament have no idea of mending this defect in their code of laws, while we have prudently avoided the introduction of it into our own.

There need nothing more be remarked for the explanation of this rule. It must be observed, that in the statute the words, *and those who legally represent them*—instead of being placed next after the clause, directing the estate to descend to the brothers and sisters of the half blood of the intestate, were by a mistake in the printing, placed next after the clause directing the estate on failure of parents, brothers and sisters, to descend to the next of kin to the intestate in equal degree. This mistake is extremely evident : it is apparent from the general tenor of the statute, that it was intended that the representative of the brethren of the half blood, should inherit as well as of the whole blood, and it is expressly determined by the statute, that the right of representation shall be taken away after brothers and sisters children, and yet at the same time the statute direct, that the estate shall go to the legal representatives of the next of kin, on failure of parents, brothers, and sisters. This is a manifest contradiction in the statute : but it is reconcileable upon placing the words, *and those who legally represent them* in the manner above mentioned, next after brethren of the half blood.

VIII. The eighth and last general rule is, that on failure of lineal descendants, brothers and sisters of the whole and half blood, and their legal representatives, representation among collaterals, being excluded after brothers and sisters children, and parents, then the estate acquired by actual purchase, or by gift or devise, from some person not of kin to the intestate, shall descend in equal shares, to the next of kin to the intestate, in equal degree, with this restriction, that kindred of the whole blood, shall take in preference to kindred of the half blood in equal degree, and with the exclusion of the right of representation.

When we come to the application of this rule, it is to be remarked

ked that the parents of the intestate, his brothers and sisters of the whole and half blood, and their children, (representation among collaterals being no further admitted,) are dead. We then are to search for the next of kin, in more distant and collateral degrees. It is possible that his brothers and sisters may be dead, and all their children, but there may be grand children of his brothers and sisters, who are great nephews and neices, to the intestate, and related to him in the fourth degree. But if the intestate had grand parents, they are in the second degree, and will next inherit. If he had any uncles or aunts who survived him, or great grand parents, they are nearer of kin than great nephews, and neices, being in the third degree of consanguinity, and of course will inherit in preference to them. If there be uncles of the whole and half blood, the uncles of the whole blood only will inherit, for the rule is, that among kindred in the same degree, the whole shall be preferred to the half blood; but if the uncles of the whole blood are dead, leaving children, the uncles of the half blood, shall inherit in preference to them; because in collateral descent, the half blood in a nearer degree is always preferred to the whole blood in a remoter degree. If some of the uncles are living and some dead, leaving children, they cannot represent their father, and take his share of the estate, for in this stage of collateral descents, the right of representation is taken away, and the whole estate will go to the surviving uncles.

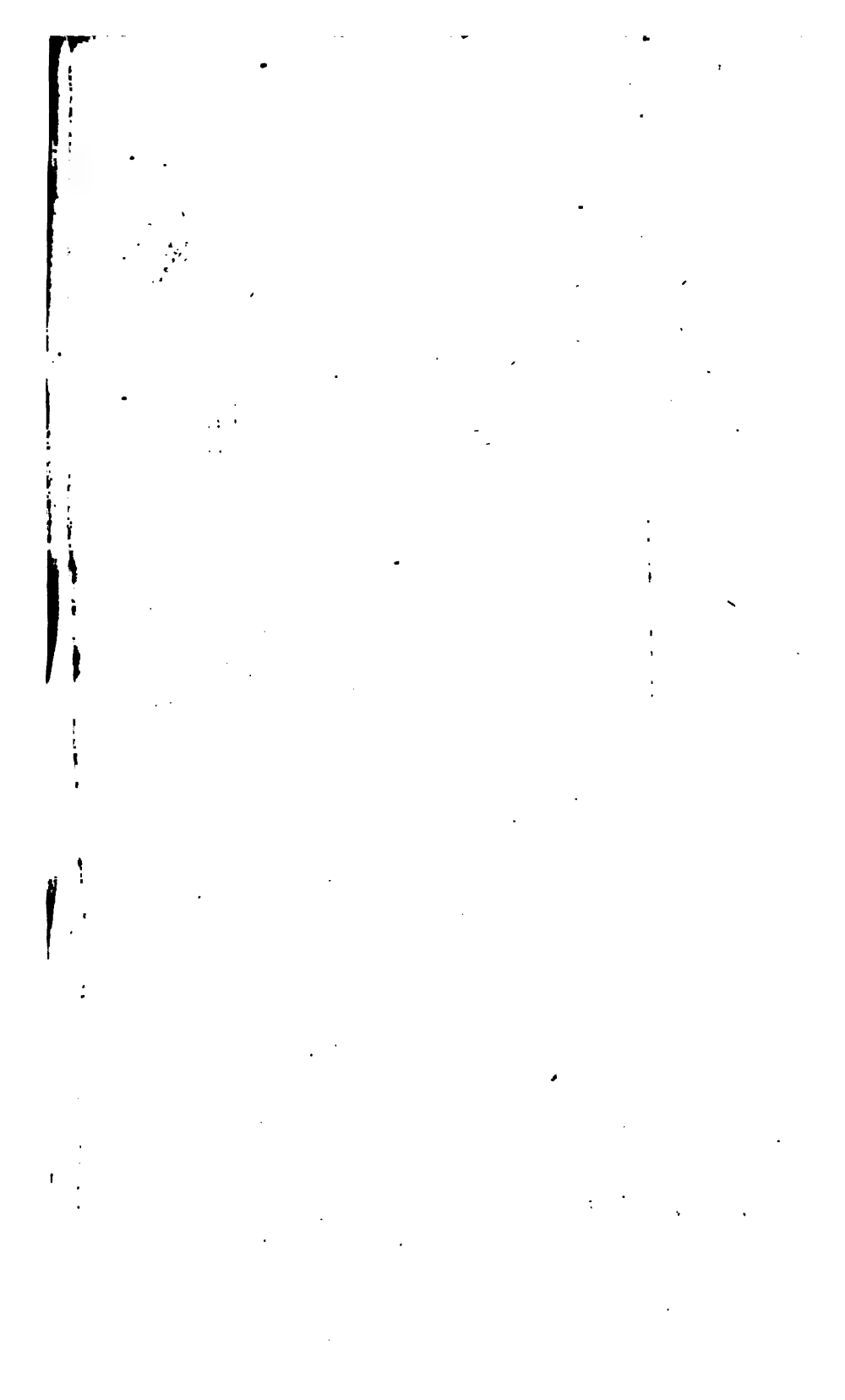
If all the uncles, and aunts of the intestate are dead, leaving children, they will stand related to him in the fourth degree; and if he has great nephews and neices, they being in the same degree, they will all inherit together, by the heads, or per capita, and take his estate in equal shares. If there be any great uncles and aunts alive, they are in the fourth degree also, and will inherit equally with them.

This doctrine of our law of descents which excludes great nephews, and nieces, or the grand children of brothers and sisters from standing in the place of their parents, and inheriting the estate of their great uncles, by the right of representation, and which of course gives a preference to the uncle of the intestate, and equal shares to cousins, appears to me not founded in the

principles of nature, or conformable to the dictates of justice, and policy. The descendants of a brother or sister, tho more remote in degree, yet as they proceed from a nearer stock than uncles, will always be considered in a more peculiar sense, to belong to one's family, and will claim a larger share of affection and attachment: and I will appeal to the heart of every man, whether in case of dying intestate, he would not chuse that his estate should descend to the grand children of a brother or sister in preference to its going to an uncle or an aunt, or being equally divided with cousins. The law therefore, instead of taking away the right of representation after the children of the brothers and sisters of the intestate, ought to take it away after the descendants of brothers and sisters. This would adopt a rule consonant to the principles of equity, and the dictates of affection, that in the first place, the lineal descendants must be exhausted, and all the collateral descendants flowing from the father of the intestate, which peculiarly constitute his family, before we advance to a more remote stock, from whence we derive branches that can inherit. But a commentator on the laws, must take the laws as he finds them.

By the English law the male branch of the family, is always preferred to the female, and recourse is never had to the female, till the male branch has become extinct. But our law makes no distinction in the right of succession, between the male, and female branch: and as the statute says generally, that the estate must go to all who are next of kin in equal degree, we must take the male, and female branches of families, hand in hand.

We have already traced the descent of estates to the fourth degree, comprehending great uncles, cousins, and great nephews, and nieces. On this extinction we must take a wider range, and all who are in the fifth degree to the intestate, will inherit in equal shares: and then on their extinction to the sixth degree, and in like manner till the heir be discovered. In this manner we might ascend, if it were possible for human beings to know all their kindred, from one stage of families to another, thro' all the successive ages, that have rolled away since the creation of man, for the purpose of discovering all the streams of inheritable blood, by  
which



# Paternal Line.

Walter  
Stiles  
*Paternal*  
*Gr. Father*

8

Christian  
Smith  
*Paternal*  
*Gr. Mother*

Luke  
Kemp  
*Paternal*  
*Gr. Mother*

8

Gratiot  
(Aunt)  
Wm.  
Stiles  
10

George  
Stiles  
*Paternal*  
*Gr. Father*

Cecilia  
Kemp  
*Paternal*  
*Gr. Mother*

William  
*Paternal*  
*Uncle*  
*Half Blood*  
9

Emma  
Stiles  
*Paternal*  
*Aunt*  
8

David  
Stiles  
*Father*  
5

Richard  
*Paternal*  
*Uncle*  
10

Martha  
*Maternal*  
*Cousin*  
10

Mary  
*Paternal*  
*Half*  
*Sister*  
6

Thomas  
Stiles  
*Brother*  
3

Robert  
*Nephew*  
1

Ruth  
*Niece*

Daniel  
Stiles  
*Elder son*  
1

Anna  
*Gr. Niece*  
10

Jonathan  
*Gr. Nephew*  
10

Benjamin  
*Gr. Nephew*

Enos  
*Grandson*  
2

which the degrees of propinquity among the sons of men may be ascertained. In this progressive research, every man must find persons that might inherit his estate; for all the nations of the earth are related together. But to ascertain the degrees of consanguinity between all the inhabitants of the globe, would be a labour that omniscience only could accomplish. Men in a few generations lose the knowledge of their remote kindred, and estates sometimes escheat, from the impossibility of ascertaining the persons, who are the legal heirs.

I shall next exemplify these rules by the Table of Descents. John Stiles the intestate and proprietor of the lands in question is the propositus, or the stock from whence the degrees of kindred are to be computed. In the first place, Daniel, Timothy, and Amie his sons, and daughter succeed him. (No 1.) If Timothy be dead, his two daughters, (No 2.) Alice and Elizabeth will share by the right of representation, one third of the estate with Daniel and Amie. If all the children be dead, then the grand children will inherit the whole estate, by the root, that is, Enos the son of Daniel will take one third, Alice and Elizabeth the daughters of Timothy, take one third, and James, Luke, and Hope, the children of Amie, take the other third. (No 2.) If Enos should be dead leaving a son, by the right of representation he could stand in the place of his grand father Daniel, and take one third. If there be no lineal descendants, then Thomas Stiles the brother, and Hannah Stiles the sister of John Stiles, of the whole blood will succeed. (No 3.) But if either be dead, their children will succeed by right of representation. So if both be dead their children will succeed, being the nephews, and nieces of John Stiles, and will take the estate by roots. (No 4.) If there be no nephews, or nieces, who are children of the brother and sister of the whole blood, then the estate will ascend to David Stiles the father, and Lucy Barker the mother if both are living, as joint-tenants, if either be dead to the survivor. (No 5.) If they are dead then to the half brothers and sisters of John Stiles, (No 6.) and their legal representatives, subject to the same restriction, as in cases of the whole blood. If they are dead then the estate will ascend to all the paternal, and maternal grand parents, who are in  
the



the second degree. (No 7.) If they are dead, the estate will go to those who are related in the third degree. There are great grand parents, uncles, and aunts, of the whole blood : (No 8.) but if they are dead, then to the uncles, and aunts by the half blood. (No 9.) If they are dead, then to great uncles, and aunts, cousins, and great nephews and nieces, who are in the fourth degree. (No 10.) Here it must be understood, that all the collateral heirs where there are several, take per capita, or by the heads, and that if there is one only in any degree, he will take the whole estate. If these relations are all dead, then the estate will descend to those who are in the fifth degree of kindred ; who are great great uncles, and aunts, the children of great uncles, of cousins, of great nephews, and nieces. On the extinction of relations in the fifth degree, we must proceed to the sixth, and so in succession till we find the heir. In passing from one degree to another more remote in collateral kindred, we must in order to find all the persons who stand in the same relation, not only descend one degree lower among the several stocks, or families, which have before been pursued for heirs but we must also ascend one stock, or grade higher : because equal degrees of kindred may be found in both directions, and tho one stock may be more remote than another, yet the proximity to it may make the degree of kindred the same. Thus the children of great great uncles, the grand children of great uncles, and the grand children of cousins, are all in the same degree of relation, tho not equally distant from the stock, in the course of lineal ascent. Every new stock to which we ascend multiplies the chance of discovering heirs, because it encreases the stock from which branches may issue, in proportion to the increase of lineal ancestors.

If the land was received by descent, gift, or devise from some ancestor, or kindred of the intestate, then on extinction of lineal heirs, to be discovered as has been mentioned, and of brothers, and sisters of the blood of the person from whom the land came, we must for the purpose of finding the other collateral heirs, take the person from whom the estate came, and consider him as the propositus, in the same manner we did John Stiles ; and then all  
the

the collateral heirs of such person, will be the collateral heirs of the intestate, of the blood of the person from whom the land came, and the estate by law will descend to such person among them, as is of nearest kin to the intestate.

Such is our law of descents, but before I close this subject, let us compare it with the English, and Imperial codes, the most celebrated that have ever been established. The rules of the English law are,—1. That inheritances shall lineally descend to the issue of the persons last seized in infinitum, but shall never lineally ascend. 2. That the male issue shall always be admitted before the female. 3. That where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether. 4. That lineal descendants in infinitum shall always represent their ancestor and stand in the same place he would have done, had he been living. 5 That on failure of lineal descendants, the inheritance shall descend to the blood of the first purchaser, subject to the preceding rules. 6. That the collateral heir of the person last seized, must be his next collateral kinsman of the whole blood. 7. That in all collateral inheritances, the males stock, shall be preferred to the female, unless where the lands have in fact descended from a female. The rules of the Imperial law as promulgated by the Emperor Justinian are, 1. That all the lineal descendants of the intestate, whether male, or female, and their legal representatives shall inherit his estate in equal shares. 2. That where there are no lineal descendants, then the ascendants, as parents and grand parents, are preferred to all collaterals except brothers, and sisters, of the whole blood; but if there be no such brothers and sisters, then all the ascendants in the nearest degree shall inherit in preference to remoter degrees, whether male or female, paternal, or maternal; and if several degrees concur, the inheritance must be equally divided between the paternal, and maternal ascendants. 3. If there be brothers and sisters of the whole blood, they shall be considered as the nearest ascendants and the estate shall be equally divided among the brothers, and sisters, and the ascendants, according to the number of persons. 4. If the intestate leave neither descendants, nor ascendants, then the estate shall be equally divided among the brothers and sisters of the whole blood,

and

and their children by the right of representation. 5. On failure of brethren of the whole blood, and their children, brothers of the half blood shall inherit. 6. The right of representation among collaterals, is allowed no further than to brothers and sisters children. 7. Where there are no descendants, ascendants, brothers, or sisters, or brothers or sisters children, the estate descends to all collaterals in equal shares that are of nearest kin to the intestate, in equal degrees.

Tho our law of descents, bears a great resemblance to the Imperial law, yet it may justly be deemed a great improvement upon it : but when we compare it to the English law, which is of feudal origin, the superiority is very manifest : and we may venture to assert that it is the most liberal, and equitable system of hereditary succession, that ever was adopted, and the most consonant to the laws of nature. The odious and unjust doctrine of primogeniture, so well calculated to aggrandize the families and support the pride of feudal aristocracy, is wholly exploded. Parents may inherit the estate of their intestate sons, when it was acquired by purchase or by gift, or devise from a stranger ; and brothers of the half blood shall not be excluded by collateral kinsmen in remote degrees. The female sex are placed upon the same footing with the other sex, in respect of their succession to property.

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#### CHAPTER SIXTEENTH.

#### OF TITLE BY DEED.

**I**N the preceeding chapter, we explained, and illustrated the rules of descent according to our law. We next come to contemplate the various modes of acquiring titles to real estates by purchase.

<sup>d</sup> Purchase in its most extended legal signification, comprehends every method by which real property can be acquired, excepting descent ; and is said to be the acquisition of a title by a man's own act, and agreement, and not by the mere operation of law. The distinction

<sup>d</sup> Co. Litt. 18. 2 Black Com. 241.

distinction between a title acquired by purchase and by descent, is very apparent. The latter must be an estate coming from some ancestor, and vesting in the heir, according to certain rules established by law. But where a proprietor in fee devises his estate to his heirs at law, to hold in the same manner and proportion, as if no devise had been made, they shall be considered as taking by descent. Purchase is where the title is obtained in some manner different from descent. Thus a title obtained by the levy of an execution, by devise, or possession is as much a title by purchase as where the full consideration is paid in money, and a deed of bargain and sale executed. So are mere gifts for the consideration of love and good will, or blood and affection.

The difference between estates acquired by purchase and descent are, that the heirs who have received estates from their ancestors, are obliged to fulfil his covenants and contracts, to the value of the estate that descended to them. By the English law, an action on a contract, such as a bond, which binds the heirs, may be maintained against the heirs, as well as executors—but by our law no action for a debt will lie against the heir, tho bound by the covenant, but against the executors or administrators only; for all the debts of the deceased are discharged, before a distribution to the heirs: and for that purpose, the real as well as personal estate may be applied by the executor or administrator. But on covenants of seisin and warranty, where the breach may happen after the death of the covenantor, and settlement of the estate, action will lie against the heirs, as in case of eviction, and they will be liable to the amount of the estate received by descent.

There are seven ways of acquiring titles to real estate by purchase, which are, by deed, by devise, by execution, by possession, by escheat, by forfeiture, and by accession, and of these we shall treat in their order.

The acquisition of real estates by deed, is the most universal method in practice, and corresponds to the common ideas of purchase in its limited sense. This is also called alienation, and denotes the transmission of estates from one proprietor to another, by a volun-

tary conveyance, upon a mutual contract, for a valuable consideration. The idea of a voluntary agreement in both parties, attends the alienation of estates, and where such agreement cannot be supposed, the conveyance cannot be called an alienation : but in common language, we make use of the words, purchase, or bargain and sell, and rarely of the word alienation.

In treating of deeds, we shall first point out their general nature, and then the several kinds. A deed is defined to be a writing, signed, sealed and delivered by the parties, containing a contract or agreement between them for the sale of lands. For a complete illustration of this subject, it is necessary to attend to the several requisites to constitute a deed ; and then to the manner how such deed may be defeated or destroyed.

1. A deed must contain in legal and proper order, sufficient words to evidence the intention and agreement of the parties, to render it obligatory. There is however no particular form, that is absolutely necessary to constitute a deed, nor need all the parts which commonly compose a deed be used, provided there be sufficient words to express with clearness and certainty, the meaning of the parties. There is however a particular form, which has been adopted, and practised upon in this state, which conveys the meaning of the parties in the clearest and most effectual manner with the greatest simplicity and conciseness ; which has been confirmed, by immemorial usage, and sanctioned by the wisdom of ages. It is therefore the safest method in conveyances, to make use of this established form, and not risque the decision of courts upon the legality of any new fangled modes of conveyance. In treating of the general requisites of a deed, it is necessary to keep in view the common form. I shall therefore in explaining the general principles of conveyancing, exhibit the completest and most perfect form of a deed.

2. A deed must be in writing or printed. It may be written in any character or language, but must be on paper or parchment. Lands originally were conveyed by parole—But the uncertainty of parole contracts, and their tendency to introduce frauds and per-  
juries

juries, has induced the legislature, to nullify verbal conveyances and to require them to be reduced to writing, to render them valid.

3. There must be parties capable of contracting, and of being contracted with, who must be sufficiently and properly described—and in this place we shall consider the persons who are capable of making contracts respecting lands.

In the first place, it may be remarked, that every proprietor of lands who is in possession, is capable of alienating them, unless restricted by some legal disability, or disqualification, and that there are some persons who are laid under such disabilities by law that they are incapable of acquiring lands by purchase. *f* Idiots, and persons of non-sane memory, or distracted persons, infants, and persons under duress are not wholly incapable of conveying and purchasing lands; for their conveyances or purchases are not absolutely void, but merely voidable. But this subject will be amply discussed, when we treat of contracts respecting personal property, and therefore nothing further need now be remarked.

2 A married woman may purchase an estate without the consent of her husband, and the conveyance is valid during the marriage, unless he avoids it by some act declaring his disapprobation of the bargain: but if the husband never avoids it, or consents to it, the married woman may after the death of the husband disagree to and avoid it. So may her heirs if she dies before her husband, or if during her widowhood, she does not expressly ratify and confirm the contract. But every other contract of a married woman, (excepting where she joins with her husband in a conveyance of lands, holden in her right,) is not merely voidable, but absolutely void.

Foreigners or aliens, are incapable to purchase or hold lands in this state, by force of statute, which declares, that no person who is not a citizen or inhabitant of this state, or one of the United States of America, shall be capable of purchasing or holding any lands within this state, without special licence from the assembly. This statute is conformable to the common law of England; but

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*2* Statutes 250. *f* 2 Black. Com. 291. *2* Ibid. 292.

in the first settlement of this country, our ancestors, tho they adopted the greater part of the common law of their native land, did not admit this principle, because in a new country, it was necessary to encourage settlers, by holding out every advantage. But when the state had become fully settled and under improvement, it was thought proper to exclude foreigners from holding or purchasing our lands.

Executors and administrators may be empowered by the court of probate, to sell lands for the payment of debts, where necessary, if the estate be not insolvent, if it be insolvent, all the lands are sold by direction of the court of probate.

It is a general rule, that to enable a person to alien his lands, he must be in actual possession either by himself, or some person under him, or the conveyance must be made to some person in actual possession. For where a person has the right of possession and property, and a disseisor is in actual possession, the proprietor has not in legal consideration, a compleat title; he cannot therefore convey to any person, but the disseisor, who has that part of the title in which the disseisee is deficient. But this must be understood to be where the person in possession claims to hold the land by an adversary title, and not under the proprietor. If the possessor, be in under the actual proprietor, then his possession is the possession of the proprietor, who may sell to a stranger. So if one person sell to another, who sells to a third, the first continuing in possession, yet the last conveyance is good, because the first seller cannot claim to hold the land against his own warranty. The reason of the law is, that it is improper and dangerous to permit pretended and disputed titles to be bought and sold; which would in reality be a transference of law suits from one person to another, and be a great encouragement to the propensity to litigation, too natural among mankind. For a man of large property and keen passion for contention, might buy up such pretended titles and fill the country with litigious and vexatious suits. *b* Such has been the common law of England, and in this state, by the statute to prevent frauds, quarrels, and disturbances in bargains, leases and other alienations of lands, it is declared, that no possible mode of conveyance, of any kind of estate in things real, shall be good and effectual

effectual in the law, where the person conveying is disseised or out of possession, unless the conveyance be made to the person in actual possession. Such conveyance is deemed absolutely void, and therefore the property remains in the person who attempts to sell, who may notwithstanding such conveyance, bring his action in his own name, and recover the possession. It has therefore been practised in these cases, for the person to whom the conveyance is made, to bring forward an action in the name of the person of whom he purchased, against the person in possession, and on recovery and obtaining possession, he may by force of the covenants contained in his deed, hold the lands against the person of whom he purchased. <sup>i</sup> But executors and administrators who sell lands by order of the court of probate, are not within the reason or letter of the statute, for they act in right of others, and cannot be said to be seised or disseised of lands.

Reversions and vested remainders, may be transferred, because the possession of the particular tenant is deemed in law, the possession of him in remainder and reversion. Therefore, tho a man has given a lease of his lands, he may before the expiration of the lease, execute a conveyance to another person, of the reversion dependent on the termination of the lease: yet contingencies and mere possibilities, tho they may be released or devised, or may pass to the heir or executor, cannot be assigned to a stranger, unless coupled with some present interest.

4. To render a deed valid and effectual, it is necessary that there be a good or valuable consideration, for if there be no consideration the deed is of no force; being construed to enure for the benefit of the grantor only. A good consideration is said to be that of blood, or of love and natural affection. Undoubtedly a voluntary gift, on motives of friendship would be good, tho in such deeds it is usual to express an additional consideration of some small sum of money, which is a sufficient consideration against the grantor, but all conveyances merely on what the law calls good consideration, may be set aside, in favour of bona fide creditors. A valuable consideration, is for money, marriage, or the like, where there

<sup>i</sup> *Barney vs. Cutler, &c.* S. C. 1793.



there is an equivalent given by the purchaser. Such conveyances executed bona fide, cannot be vacated in favour of creditors.

A deed that is founded upon a usurious contract is void, and so are all conveyances that are executed by fraud or collusion, with an intent to cheat or deceive honest purchasers and lawful creditors. The statute against fraudulent conveyances, declares, that all fraudulent and deceitful conveyances of lands, tenements, and hereditaments, shall be utterly void, notwithstanding any pretence or feigned consideration, excepting between the fraudulent parties.

5. There must be a subject matter or something which is contracted for, and sold, which must be sufficiently and properly described. Thus, it is essential that the land intended to be conveyed, be so located, butted, bounded and described in the deed, as that it can be known where it lies, and be distinguished from any other tract of land ; or there must be such reference to some known and certain description, as will reduce the matter to a certainty. Thus a reference in one deed, to some other deed or thing, by which the description can be known with certainty, is good and sufficient.

6. The deed must also ascertain the quantity of interest, or kind of estate which is granted. This may be done in the premises, or when the parties are first described, but is usually reserved for the province of the words *to have and to hold*. But if the kind of estate be determined in the first part of the deed, any subsequent variation will not alter it. For instance, if lands be granted to a person and his heirs and assigns forever, to have and to hold to him for life, and then to another in fee, he shall take an estate in fee, by the first expressions, and which cannot be altered by any subsequent words in the deed : for the first words create the estate, and the rule in construing deeds is, that the first words shall operate. But the usual method is not to limit or define the estate, till we come to the words, *to have and to hold*, and then it is done by limiting it to a certain person and his heirs and assigns forever, or to a certain person during life, or for years, and then to some other person according to the nature of the estate to be conveyed. The expression *to hold*, has no signification in our deeds. In early times, it was used in England to designate the species of tenure by which

which the lands were to be holden, as by knight's service, or soccage, or of the capital lords of the fee. But in this state, as all our landholders have an allodial title, they cannot be said to hold of any person. But as this word was originally used in conjunction with the word, *to have*, it has been continued to be used without annexing any meaning to it, and in violation of the rules of propriety.

7. We next consider any terms, stipulations, reservations or conditions that may be annexed to a deed. In England, while the feudal system was in force, there was alway a reservation of some rent, either in certain services to be performed, or money to be paid, according to the nature of the estate. Our lands are not incumbered with any such slavish reservations; but the parties may and very frequently do, make reservation of rent in leases. Grantors frequently reserve to themselves some right, privilege, or benefit in the granted estate. If the estates be dependent on some condition, then a clause pointing out the contingency, will be inserted, and if the condition be not fulfilled, then the estate to remain in the grantee, otherwise to be defeated: but if the grantee hold on condition of performing certain conditions, then on failure to revert to the grantor.

8. Deeds usually contain certain covenants, which are denominated covenants of seisin, and warranty: for the grantor warrants to the grantee, that at, and until the enfeoffing of the deed, he is well seized of the premises, that he has good right to sell in such manner, as he in fact does sell, and that the same is free from all incumbrances. He then proceeds to bind himself, to warrant and defend against all claims and demands. In these covenants of seisin and warranty, the grantor usually binds himself, his heirs, executors, and administrators, which are therefore denominated covenants real, and will descend upon the heirs, executors, and administrators, who are liable to fulfil the same, so far as they have estate, or assets, which descend to, or come into their hands; in which case they stand upon the same footing as the grantor: but if they receive no estate, then they are under no obligation to fulfil such covenants. The difference between the covenants of seisin, and of warranty, is this. An action may at any time be brought

brought by the grantee against the grantor, if he had no legal title to the land, at the time of the sale, without waiting for a trial at law, to decide the title, or an eviction. Thus if a man conveys to another, lands to which he has no title, the grantee may instantly bring his action upon the covenant of seisin, for the grantor has broken his covenant, because he is not seized according to it. But where the grantee obtains possession of the premises, and is evicted by some person who has the legal title, then an action lies upon the covenant of warranty. It is the usual practice when an action is brought against a person to recover the land in his possession, to notify, or cite the grantor, who is called the warrantor or voucher, or his heirs, to come in, and defend in the action; and in case the grantee be evicted of the lands, then the voucher, or his heirs, on an action brought against him or them, on the covenant of warranty, cannot be admitted to contest such judgment, but shall respond all damages: but if the grantor, or his heirs, be not cited, then in an action brought on the covenant of warranty, they may contend the prior judgment; but if it be found that the grantor had not the title of the land, the grantee will recover his damages and costs.

1 Where land is transmitted from sundry persons, with usual covenants, and the last purchaser is ousted by reason of the defective title of the grantors, and his immediate grantor is a man of no property, and unable to make good his covenants, then the last purchaser may call upon either of the antecedent grantors, who is able, and compel them to respond damages, because in deeds the covenants run to the grantee, his heirs and assigns.

2 To constitute an express covenant of warranty, the word *warrant*, must be used; to bind the heirs, the word *heirs* must be inserted; to enable the assignee of the grantee to maintain an action on the covenant of warranty against the grantor, the word *assigns* must be in the deed.

3 There are also implied warranties, or warranties in law. In partition, or exchange of lands, a warranty is implied. So in a lease of lands for a consideration paid, or reserving rent, the law implies a warranty. In a feoffment, or deed in fee, by the words,

• *I have given*, the feoffor only is bound to the implied warranty, and not his heirs, by the common law of England. <sup>p</sup> Before the statute which prohibited the subinfeudation of lands, if a man had given lands by the expression, *I have given*, to have and to hold, to him and his heirs of the donor, and his heirs, by certain services, then the donor and his heirs were bound to the implied warranty : but if the lands were given to be holden of the chief lord, then the donor was bound only during life. For in these cases, the contract is personal, and while the consideration is continuing by the performance of services, the warranty continues even to the heirs ; but when the tenure resulted back to the superior lord, the contract being personal, there was no consideration to extend it to the heirs. In this state there can be no question, but that the feoffor is personally liable in a deed in fee, with the words, *I have given*, upon the general implied warranty, even if the deed contains a special warranty against all claims from him, or his heirs ; but it is a question how far the heirs are liable. Where estate descends from the ancestor to the heirs, sufficient to fulfil such warranty, there seems to be the same reason to render them liable, as there was in England, at the time when lands were conveyed to a person and his heirs, to hold of the donor, and his heirs, by certain services. For the ancestor has received the property of the donee, and has left property to descend to his heirs, sufficient to make good the warranty.

7 Warranties extend not only to the title, but to the quantity of land contained in the deed. If however, the quantity be left uncertain, as where it is expressed, be the same, more or less, there is no warranty. So where there was a conveyance of a tract of land, said to contain one hundred and ten acres, described by metes and bounds, the fact was, the seller owned all the land within the described bounds, but there was only ninety acres. In an action on the covenant, the court decided that the warranty only extended to the bounds, and not to the quantity, and that the plaintiff ought either to have measured the land, or had an express warranty with respect to the quantity.

9. The conclusion of the deed ought to mention the date, or the time of its execution and delivery, either expressly or by refe-

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 • dedi. <sup>p</sup> Quia emptores terrarum. Co. Lit. 384. <sup>q</sup> Snow vs. Chapman, 8. C. 1793.

rence to some time before mentioned. A deed however, which has no date, or a false or impossible date is good, provided the real day of the date or delivery can be proved : for a deed does not derive its force from the date, but from the delivery.

10. It is requisite that the deed be read, when any of the parties desire it : and if it be not done it is void as to him. The subscriber to the deed, ought to read it himself, if he can, but if he be blind or illiterate, then another person must read it to him. If the deed be read falsely, it will be void at least, so much as is read falsely ; unless it be read falsely, by collusion, and on purpose to avoid it : and then it shall be binding as far as it respects the persons, that are knowing to the fraud and collusion, but no further.

11. A deed must be subscribed by the grantor, and attested by two witnesses—for the statute enacts, *r* that all grants, bargains, sales, and mortgages of houses and lands, must be in writing, and subscribed by the grantor with his own hand or mark, unto which mark his name shall be annexed, and also attested by two witnesses with their own hands or marks, unto which marks their names shall be annexed.

*f* It has been adjudged, that where the grantor directs another person to write his name, or where his hand is guided by another in writing his name, it is a signing of the deed within the statute, and valid to convey the estate. It is the universal practice, to seal deeds, as well as to sign them. Tho this is not expressly required by statute, yet as by the common law, a deed is considered to be an instrument under hand and seal, and sealing deeds having been always practised, it may now be deemed an essential requisite, tho it must be acknowledged at present, to be nothing more than an unmeaning formality, and ought to be abolished.

12. To make a deed valid, it is essential that it be delivered by the party himself, or his certain attorney. This is commonly expressed in the attestation, signed, sealed, and delivered. A deed never takes effect till the delivery ; therefore, if there be no date, or a false or impossible date, the delivery ascertains the time, when it commenced its operation. The delivery of a deed may  
tional,

*r* Statutes, 256. *f* Cray, &c. vs. Stoddard, S. C. 1794.

be absolute, as when it is delivered to the party himself, or conditional, as when it is delivered to a third person, to be held till some condition be performed by the grantee, or the happening of some contingent event, and then to be delivered to the party. In which case, it is not delivered as a deed, but an escrow, a scrowl, or writing; which is never to take effect, till the conditions are performed, or the contingency happens.

13. \* The statute law requires, that all grants and deeds, made of houses, and lands, shall be acknowledged before an assistant, commissioner, or justice of the peace. If a person after the execution of a deed, refuses to acknowledge it, the grantee after requiring it, may enter caution with the recorder of the town, respecting the houses or lands, granted or mortgaged to him, which shall secure the interest till a trial can be had: and then a copy of the judgment delivered to the register, and by him recorded, shall establish the title.

14. \* A deed must be recorded. The statute law enacts that no deed shall be accounted valid and compleated according to law, but such as shall be written, subscribed, witnessed and acknowledged, and all such grants shall be recorded according to law: that no grant or deed of bargain, sale, or mortgage, made of any houses or lands shall be accounted good or effectual in law, to hold against any other person or persons whatever, but the grantor or grantors and their heirs only, unless the grant, deed or deeds thereof be recorded at length in the records of the town where such houses and lands lie: and the town-clerk or register of every town in the state, shall on the receipt of any deed or conveyance, or mortgage of any house, or land, brought to him, note thereupon, the day, month and year, when he received the same, and the record shall bear the same date.

The regulation adopted by this statute, is founded in the highest wisdom and policy, and has a most effectual operation to reduce the titles to things real to certainty, and lessen the sources of litigation. The records and files of the towns, will shew to every person, that is pleased to enquire, in whom is vested the legal title to lands, and inform him whether he can purchase with safety. This renders all conveyances of lands a matter of much more public no-

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\* Statutes, 250.

\* Ibid.

society,

tority, than the ancient method of livery of seisin, or corporal investiture; and as it makes that practice wholly unnecessary, it is probably the reason of its disuse. However, these prudent regulations cannot wholly prevent fraud and difficulty. A man may execute a deed of land to one person, and receive payment, and before the deed is recorded, sell the same land to another, and the last purchaser procure his deed to be first recorded. To obviate this inconvenience, it has been determined, that every purchaser of land shall have a reasonable time to procure his deed to be recorded after the execution of it. But the length of time that is to be considered reasonable, has never been ascertained, and perhaps cannot be, and must be left according to the special circumstances of each case. It has been adjudged where two deeds were taken on the same day, and the last deed was recorded the next day in the forenoon, and the other in the afternoon, that the first deed was recorded in reasonable time, and should hold the land. The propriety of this decision cannot be questioned: but then it has been determined, that where the person was not more than seven miles distant from the town-clerk's office, that more than two years was a reasonable time. This decision goes in some measure to defeat the design of the statute, and renders it impossible in some instances, to determine the owners of lands by the records of the town. A person having the title to lands apparent by the town records, may have sold, and conveyed them a long time before, and the purchaser has neglected to record his deed. Another person on discovering the record title to be in his favor, and being ignorant of the sale, may purchase, pay his money, and record his deed. Then the other deed may be produced and recorded, and if a court should think it to have been recorded in a reasonable time, and they have judged two years to be a reasonable time, the other conveyance is defeated. The statute ought to have fixed a certain period, within which deeds should be recorded, after their execution, so as to have avoided this difficulty: but as none is fixed by statute, courts in ascertaining a reasonable time, ought to allow a person no more time than is necessary, by using due diligence to accomplish the business; for the recording of deeds ought not to be delayed, as it is intended to furnish public evidence of the title of lands: and if the

the time be extended beyond what is necessary to procure the deed to be recorded, an honest man, instead of deriving information from the records of towns, will be misled by them, and defrauded of his property. But where the second purchaser has knowledge and notice of the first purchase, tho the deed be not recorded, if he procures his deed to be first recorded, yet he ought not to hold the land. For where the second purchaser had notice, he could not be deceived, and it was a fraudulent, dishonest act to purchase, knowing the former sale, and to take advantage of a bona fide purchaser, because he had neglected to record his deed. The world therefore must approve the maxim, that notice of the first sale to the second purchaser, shall defeat his purchase, tho he procure his deed to be first recorded. For the object of the law in requiring the recording, is only to give notice of conveyances, to secure subsequent purchasers against prior secret conveyances and fraudulent incumbrances, and where a man has actual notice, it answers the same purpose, as if the deed was recorded; and if he will take the legal estate, after notice of a prior right, he is a purchaser mala fide, tho he pays a valuable consideration, and conforms to the requisites of the law. He ought not therefore to hold against the bona fide purchaser. But if a purchaser for a valuable consideration, should not procure his deed to be recorded, within a reasonable time, and another without notice should purchase the land and procure his deed first to be recorded, he will be entitled to hold it both in law and equity; and no court, in a case so circumstanced, should give to the first purchaser, any longer time within which, to record his deed, than what is necessary by the use of due diligence. So that the question will commonly be, whether the subsequent purchaser had notice of the prior conveyance. The same reason ought to apply in cases of attaching lands, and levying executions thereon. If the attaching creditor, knows that the land has been previously conveyed by his debtor, for a bona fide consideration, tho the deed is unrecorded: yet it is not just for him to attempt to take it from the purchaser, to pay the debt of another, for if a man neglects to procure his deed to be recorded, for the purpose of screening the estate from his creditors, yet it may be taken for his debts, and equity will compel a conveyance, so that the estate is liable for his debts, tho the deed is unrecorded.

These



• These principles respecting notice, have been recognized by the courts of laws in England, in those parts of the kingdom, where conveyances of lands have been required by law to be registered.

Having considered the requisites of deeds, we are next to consider how they may be destroyed. If a deed want any of the material requisites before enumerated, it is void, excepting however the requisites of acknowledging and recording. The want of an acknowledgement may be supplied by the feoffee, and a deed unrecorded is good against the feoffor. But in this place it is our object to consider, what acts may be done after the execution of the deed, by which it may be rendered of no effect.

1. • As to alterations. Anciently, if there were any rasure, or interlineation in a deed, the court on inspection, determined it to be void : but afterwards, this was left to the consideration of the jury upon the proof, and if they found the rasure or interlineation to have been done before the execution, the deed was adjudged valid. To a void uncertainty in this respect, it has been usual where there was an interlineation, or rasure in the deed, to make some memorandum at the time of the execution and attestation. But now whether any such memorandum be made or not, a mere rasure or interlineation, shall not of itself be presumed, to be done after the execution of the deed, so as to vitiate it : but shall with the whole of the deed, depend upon the proof, for its validity, and be submitted to the consideration of the jury, to determine whether it be the individual contract, delivered by the parties.

If a deed be altered by a stranger in a point not material, without the consent of the feoffor, it will not nullify the deed, because it does not change the contract : but if it be so altered in a point material, it is vacated, because it does not contain the actual contract of the parties.

But if a deed be altered by the party himself, tho in a point not material, it is rendered void. For when the party himself, makes any alteration in his own deed it discharges the contract : for the parties having agreed upon the precise form of words for  
their

their contract, if the party in whose favour it is, attempts to alter it, he makes a new contract in construction of law, which discharges the first contract : and the new one being made with himself without the consent of the other party, is absolutely void, and ineffectual. But the principal reason of this rule is, to prevent people from making any alterations in their deeds for fear of vacating them. By the common law, the breaking off the seal vacates the deed.

2. Deeds may be rendered void by the disagreement of those parties whose concurrence is necessary. Thus in cases of married women, by the disagreement of the husband, or her own, after she becomes single. So of infants, lunatics, and persons under duress, after the disabilities are removed.

3. Deeds may be declared void by the judgment of courts.—The power of courts of chancery to set aside deeds, which were obtained by fraud, collusion, or by some unjustifiable measures, belongs to a treatise upon equity. In this place, I shall only remark that all fraudulent conveyances to defeat creditors are void as to the creditors, but not the parties, and that creditors may take such lands by execution, and in an action of disseisin to recover the lands, the question respecting the validity of the conveyance may be tried. And if the conveyance be found to be fraudulent, the court will consider it to be void, and the creditor by force of his execution will hold the land so conveyed, in the same manner as if no conveyance had taken place. All conveyances, as gifts upon the consideration of blood, natural love and affection, may be set aside in favour of creditors, in the same manner. A consideration must not only be valuable, but bona fide, for tho an actual payment be made, yet if done mala fide, and the intent is to defeat creditors, the deed is void.

It may be considered as a general principle, that a deed cannot be void with respect to a debt contracted subsequent to its execution : \* but it has been determined where a person made a sale of lands without consideration, and continued in possession, and appeared to be the owner, that such deed was void, as it respected

\* *Mason vs. Rogers*, S. C. 1791.

a debt contracted during such possession. In this case there was ground to presume, that such sale was made with a view to enable the seller to contract debts, and avoid the payment ; but where a sale is made without consideration, and the purchaser goes into possession, a subsequent creditor does not trust the seller, on the credit of such estate, and of course as to him, it cannot be a fraud.

γ No person can take advantage of a fraud, to set aside a conveyance, but he who is prejudiced by it, and has legal title. Therefore, where it appears that the defendant has no title, he can take no advantage of a fraud in the title of the plaintiff, for this was no prejudice to him.

We have considered the nature and requisites of deeds in general, we proceed in the next place to a survey of the several kinds of deeds, or modes of conveyance adopted by our laws.

1. A deed in the form I have already described, is the most universal and approved method of conveying estates in fee simple. This instrument of conveyance, is denoted by the word deed : and this word in common understanding is appropriated to signify that instrument only. For tho in legal consideration, a deed comprehends every species of conveyances, as well as bonds and covenants under seal,—yet in common practice, we have appropriated this general term, to point out this particular instrument, in stead of the particular term, which would be feoffment : and the other instruments of conveyance are distinguished by their particular names, yet in our law proceedings, we consider the word deed, according to its legal import.

Our deed is the same with the ancient feoffment used in England, varying only so as to exclude certain terms, which had immediate reference to the system of feuds, and by way of distinction among lawyers, it is still called a feoffment. The operative words usually inserted in deeds are, give, grant, bargain, sell, alien, enfeoff, convey :—either of which would be sufficient to transfer the estate. The sellers are indiscriminately called, donor, grantor, or feoffor, and the purchasers, donee, grantee, or feoffee—By deed estates in fee-simple, fee-tail, and for life, which are created by

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the act of the parties, are transferred. As we know of but few estates, excepting fee-simple, our conveyancing can boast of a simplicity, conciseness, facility, and cheapness, superior to any other country.

The original mode of conveyance in England was oral, and the evidence consisted in livery of seisin, or corporal investiture of the land in the presence of the freeholders of the county. This was the general method in those rude and ignorant ages, when the people were unacquainted with letters, or incapable of writing. But the uncertainty of such conveyances, soon led them when they had acquired sufficient knowledge to introduce conveyances in writing. They first adopted the simple and concise mode by feoffment : but for the purpose of rendering the transaction notorious and public, they accompanied it with livery of seisin, or the corporal tradition of the possession of the lands. Some inconvenience resulting from the requisite of delivery of possession of the lands transferred, induced them to adopt various modes of conveyance to elude it : and lease and release, are now the most common mode of conveyance in England, and in those of the States in America, who have closely copied the English law. This mode of conveyance is so abstruse and intricate, that it requires much technical knowledge to be able to draw it, and is so voluminous, as to be attended with great expense. In a country where a free transfer of real property is admitted, it must be very inconvenient to have it encumbered with such intricate and expensive modes of transference. In this state, we have reason to revere our ancestors for the liberal spirit that led them to deviate from the laws of the country, from whence they emigrated and establish a mode of conveyance, so plain that every proprietor of lands can easily acquire sufficient knowledge to draw instruments to transfer them.

In this state the law requiring the recording of deeds, superseded the necessity of an actual delivery of possession of the premises. For as this is a much more effectual mode to make the transaction known and public, it would be superfluous to continue the common law practice of delivery of possession. It is unquestionably, upon this principle that that practice has been generally

discarded, tho it is true there are some instances, where we see persons go through with the ceremony of delivery of possession by turf and twig, in compliance with the tradition of its necessity.

All that is required by our law, to transfer the estate is, that one party be either in possession himself, or by some person under him : but if a stranger be in possession claiming right, or holding by an adversary title, then the deed is void.

2. A lease is a conveyance of the use of lands for life, for years, or at will ; but must be for a less time than the lessor has in the premises, for if it be of the whole interest, it is an assignment. It is by deed only, that the fee of land passes, and by lease, nothing passes only, the use. The operative words in a lease are, *demise, grant, and to farm let*. Leases are made either in consideration of money paid, or rent reserved in the lease. It is the most common practice, to take leases of lands upon the contract to pay a certain sum, which is paid in hand, or secured by an obligation distinct from the lease, in which case, the lessee purchases a certain term in the lands : but sometimes leases are made in consideration of certain rent reserved in the lease : to which conditions may be annexed, as a forfeiture of the lease, and right of re-entry in the lessor, when the rent is in arrear.

If a person has power, by virtue of a letter of attorney, to make leases for years, generally, he must do it in the name and stile of his master, and not in his own name. He must subscribe the name of the principal, and deliver the lease as his act. For if he signs his own name, and adds by virtue of the letter of attorney, this will not help it, because, by the letter of attorney he acquired no interest, but only the power of acting for the principal.

Leases must be recorded by force of statute, which enacts, a “ that  
 “ no lease hereafter made, of any houses or lands within this state,  
 “ for life or any term of time exceeding one year, shall from and  
 “ after the first day of September next, be accounted good and ef-  
 “ fectual in law, to hold such houses or lands against any other per-  
 “ son or persons whatsoever, but the lessor or lessors, and their  
 “ heirs only ; unless such lease be in writing, and subscribed by  
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“ the lessor, and attested by two subscribing witnesses, and acknowledged before an assistant or justice of the peace, and be recorded at length, in the records of the town where such houses and lands are.

“ That no leases of houses and lands already made for term of life, or any term of time, exceeding one year from the time of rising this assembly, shall be good and effectual in law, against any other person or persons, but the lessor, or lessors, and their heirs; unless the same be recorded in the records of the town where such estate lies, on or before the first day of September next.”

z It has been adjudged, that writing, giving liberty or licence to flow lands, for the purpose of a mill, is within the law, and must be recorded, or it is void against creditors and purchasers.

Tho a parole lease, is null by the statute of frauds and perjuries, yet it may operate in some instances, as a licence. If a person by virtue of a parole lease, enter into the possession and improvement of lands, he cannot be sued as a trespasser, for the parole lease will amount to a licence to enter. If he plants or sows, he will be entitled to the emblements. He cannot be sued on a contract to pay rent, but where he takes the profits of the land, *indebitatus assumpsit* will lie to recover the value.

3. An *exchange* is defined to be a mutual grant of equal interests, the one in consideration of the other. The estates must be equal in quantity of interest, as fee simple for fee simple, but may differ in valor. The word exchange, is by law appropriated to this case, and can be supplied by no other. This mode is not practised in this state, but the custom is, for each party to execute deeds in common form.

4. A partition is where two or more joint-tenants, co-parceners, or tenants in common, agree to divide the lands, each taking his part and portion. They mutually convey, and assure to each other, the several estates they are to hold separately.

These are denominated primary, or original conveyances ; the following are called secondary, or derivative conveyances.

5. Releases, which are a discharge, or conveyance of a man's right in lands to another, that hath some former estate in possession. The words generally used are, "*remise, release, and forever quit-claim.*" Releases enure to enlarge an estate, as where the remainder man releases his right to the tenant for life, or the reversioner to the tenant for years : to pass a right, as where one co-parcener releases to another : to pass an estate, as where the disseisor releases to the disseisee; or where a person disseised by two, releases to one of the joint disseisors, the disseisor to whom the release is given, shall hold the lands, to the exclusion of the other.

We have in this state a common mode of conveyance, called a quit-claim deed. Tho it be in the form of a release, yet the object is to transfer lands without warranty express or implied. It is therefore a common practice for a proprietor of lands to execute a quit-claim deed to a purchaser, who has neither possession or pretence of claim : and as by our law, a deed is considered in all cases, as giving possession, this operates as a conveyance without warranty.

6. - A confirmation is nearly allied to a release, and is defined to be a conveyance of an estate, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased, and the words of making it are, have given, granted, ratified, approved, and confirmed.

7. An assignment is properly the transfer of all the right a person has in any estate, but is usually applied to estates for life, or years. It differs from a lease in this, a lease only grants part of the interest, reserving a reversion, but an assignment disposes of the whole estate.

8. A defeasance, is a collateral deed, made at the same time, with the other conveyance, containing certain conditions, upon the performance of which, the estate then created, may be totally undone. Originally mortgages were usually made in this manner, the mortgagor conveying to the mortgagee, and he at the same time executing a deed of defeasance, whereby the deed to him

was

was rendered void on the repayment of the money borrowed at a certain day. But the practice is now to annex the condition to the mortgaged deed, and so indeed of all other conveyances intended to be conditional, which has rendered defeasances as separate deeds, unnecessary.

Before I close this chapter, it is necessary for me to give a slight sketch of the law, respecting uses and trusts. On this subject however, I shall be extremely concise, as our law concerning lands, render unnecessary such modes of conveyance, and it is inconsistent with the nature of this elementary treatise, to go into a minute consideration of all the subtleties and refinements, which have been introduced into that branch of law, by the English jurists.

Uses originated, it is agreed, from a principle in the Roman law, which admitted a usufructuary property in a thing, distinct from a thing itself; that one person might own lands, and another be entitled to the use. This principle was transported into the English law by the clergy, for the purpose of eluding the statutes of mortmain, which prohibited them from holding lands. As the chancellors were generally clergymen, they countenanced, supported, and established this doctrine. A use, may be defined to be a gift of lands to one person, for the use of another, who in law language is called *cestui que use*. Feoffor, enfeoffs a person of lands to the use of himself, or some other person. The feoffee has the legal property and possession of the lands, while the cestui que use had a right to enjoy the profits. But cestui que use, was considered as having no right to, or in the thing itself. The absolute property was in the trustee, and the cestui que use confided in the conscience of the trustee, for the profits of the land. The chancellor whose peculiar jurisdiction extended to matters of conscience, would compel the feoffee in trust, to perform the trust reposed in him. When the clergy had introduced this artificial principle of jurisprudence, it was adopted by civilians to avoid the restraint, and hardships of the feudal system, upon the proprietors of lands, which they then began to feel to be very burdensome and oppressive. During the long civil wars between the houses of York and

Lancaster

a 2 Black. Com. 327, Bacon. Title Uses and Trusts. 3 Reeve Hist. English law, 364. 4 Ibid. 126, 159, 242, 340.



Lancaster, this became a common mode of conveyance, for the purpose of securing estates against forfeitures. When uses had become general, a refined system of rules respecting them was adopted. In chancery it was said, every man shall have his remedy according to the intent of the feoffment, and according to conscience, but in the courts of law it is otherwise ; for the feoffee shall have the land, and the feoffor shall have nothing against his own feoffment, tho it was upon confidence. The chancery of course assumed exclusive jurisdiction respecting uses.

The regulations respecting uses, that rendered them subservient to the views, the wishes and the interest of the people were :

1. That uses could not be forfeited to the king for treason, by which the estate might be secured to the heir, against that barbarous law of forfeiture, which punishes the children for the crime of the parents.
2. That uses should not be liable to any of the feudal burdens, as escheat for felony, or defect of blood, or wards, marriages, reliefs, heriots, and aids to knight the eldest son, or marry the daughter.
3. That uses should not be extendible for debts, on any legal process, by which the cestui que use was enabled to cheat his creditors.
4. That uses were deviseable, by which cestui que use might make suitable and convenient provisions and settlements for his family, which was deemed a great privilege at the time of the feudal restraints upon devises.
5. That uses might be assigned by secret deeds between the parties, by which the proprietor of the lands might be kept unknown, and the parties avoided the trouble and inconvenience of livery of seisin, or delivery of possession of the land, as required at common law.
6. That husband should not have curtesy of a use, nor the wife be endowed, which gave birth to the doctrine of jointures.

At the same time courts of chancery determined, that uses could not be raised without sufficient consideration, and that they were descendable according to law. It is easy to see the inconveniences that must necessarily result from this metaphysical species of estate, while conveyances could be made in a secret manner, and the land and the use were two independent subjects, and might reside in different persons. Sundry salutary regulations were made to avoid

avoid this inconvenience without effect, till the famous statute of uses passed in the 27th year of Henry, VIII. which was calculated to cut up uses by the roots. This statute recites the frauds arising from secret conveyances, without livery of seisin, and from wills sometimes in writing, and sometimes by naked words, or tokens by persons, visited by sickness, in their extreme agonies and pains, by designing persons, to the disinheriting of heirs ; the injustice that arose in depriving lords of their feudal rights, and the crown of the benefits of forfeitures ; the perjuries in the trials of the secret wills and uses, and the uncertainty respecting the property of the lands ; and then enacts, that when any person shall be seised of any lands or other hereditaments, to the use, confidence or trust of any other person, or body politic, the person or corporation, entitled to the use in fee-simple, fee-tail, for life, or for years, or otherwise, shall thenceforth stand and be seised or possessed of the land of, and in the like estate, as they have in the use, trust, or confidence, and that the estate of the person so seised to the use, shall be deemed in them, that have the use in such manner, quality, form, and condition, as they had before in the use. Thus the statute executes the use as it is termed, that is, transfers the use into possession ; by which means the cestui que use become compleatly possessed of the land in law, as he was before in equity. <sup>b</sup> No words says Reeve in his history of the English law, could be imagined more simple, and at the same time more efficacious for the annihilation of uses, than the purview of this act. By a kind of legal magic, the whole frame of landed property seemed on a sudden to be changed, and every man who had before, only the use of his estate, at the mercy almost of his feoffees, was made in an instant, the compleat and lawful owner of it.

The courts of law instead of sending suitors to the courts of chancery for relief, began to take cognizance of uses as legal estates : and the learning of landed property would have been settled again upon the principles of common law, had it not been for the narrow, technical, and illiberal notions of the judges. They determined that no use could be limited on a use, and that when

<sup>b</sup> 4 Reeve's hist. Eng. law, 245.

When a man bargains, and sells his lands to another for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, that the statute did not extend to terms of years, or other chattel interests, because the expression was only seised, and the termor is not seised but possessed, and that where lands are given to one, and his heirs, in trust to receive the profits, and pay over to another, this use is not executed by the statute : for the land must remain in the trustee to enable him to perform his trust.

These decisions of the courts of law rendered necessary a recurrence to the chancellors, who took cognizance of such cases, and in a short time revived under the denomination of trusts, their jurisdiction of uses, for it was easy to vary the form of words, by which the conveyance was expressed, so that according to the decision of the courts of law, the statute of uses would not execute the use, or transfer the uses into possession ; and then the courts of chancery would take cognizance of them as trusts.

So that the whole effect of the Statute of Henry, VIII. on uses, was to render it necessary for the chancery to elude it, to change the name of uses into trusts. This statute however gave efficacy to certain new modes of conveyance, calculated to render these transactions secret and save the trouble of livery of seisin. Such as a covenant to stand seised to uses, and lease and release, which are the common modes of conveyance in England.

But when the courts of chancery resumed their jurisdiction over uses under the name of trusts, they adopted rules which were calculated to avoid the inconveniences that were derived from uses. They considered a trust estate to be equivalent to a legal ownership, governed by the same rules of property, and liable to every change in equity which the other is in law.—The cestui que use, has no right in, or to the thing in law, but in equity he has. The trustee is considered as the mere instrument of conveyance, and cannot effect the estate. Yet in consideration of law he is the proprietor of the estate, but not in equity. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases,  
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and other encumbrances, and to the curtesy of the husband as if it were an estate at law. The trustees may be compelled in chancery to make conveyances to the cestui que trust, or such other persons as equity may require. Such is the law of England, respecting uses and trusts.

But as in this state, none of the reasons exist that did in England, for their introduction, and as no advantages can be derived from them it is not probable that they will ever be adopted. The recording of our deeds, precludes the possibility of a secret mode of conveying estates, by which the legal estate can be concealed, or rendered uncertain, and a provision for prodigal children may as well be made by giving them the use of the estate during life, or to another in trust for him—as in both instances, the estate will be equally at his controul and equally liable for his debts. The truth is, our general law has given the proprietors of land, every honest privilege that can be derived from uses, and trusts; that is, exemption from forfeiture and the feudal incidents, and the power of devising, and has deprived them of every unjust privilege, that was acquired by the cestui que trust, that is, exemption from liability to be taken for debts, and the power of secret conveyances, tho there be no necessity of a formal public delivery of possession.

If the decision of the superior court in the only case which has come before them, be considered as law, the business of uses and trusts, is at an end. They have adjudged that the cestui que use, shall take the estate in the same manner, as tho it had been directly granted to him; and that the feoffee, or trustee has no property in the estate, even at law. As this is the only case that has been adjudged on this point, it is necessary to consider it at large. The case was, Nathaniel Cornwell in consideration of love and good will to Abigail Taylor, his neice, and wife of Joseph Taylor, granted to Jeremiah Bacon, his heirs and assigns, the lands in question, to hold in trust for the said Abigail during life, and then for her children, born, or to be born, and to their heirs and assigns forever. Abigail died leaving four children, and Joseph Taylor as their guardian was in possession of the lands, and action

of disseisin was brought against him, by said Jeremiah, to recover the possession ; the court determined, that the children of Abigail had an absolute estate in the lands in question, and that the possession follows the use, that said Jeremiah being only a mere nominal person in the deed, and no consideration arising from him, he is considered as having no legal estate in the premises, by which to recover possession. Their opinion is grounded upon the principle that the doctrine respecting uses established by the statute of uses in England, was in the idea of our ancestors, at the time of their emigration, the law, and that to establish a doctrine of uses here, which would necessarily acquire a number of statutes to remedy the inconvenience, resulting from it, would neither be wise or prudent.

By this decision, it is established that cestui que use, will take absolutely as large an estate, as the use or trust given to him. If the use be to him, and his heirs, then he takes an absolute estate in fee-simple ; if for life, or years, then an absolute estate for life or years, while the feoffee or trustee takes not even the shadow of a legal estate. This extends the statute of uses to trusts, as well as uses, and annihilates all such estates at a single stroke. This was not however a unanimous decision of the court, and the reasoning of the minority demonstrate that the judgment of the majority was against the then existing law.

The courts of common law in England, always recognised the principle, that feoffee or trustee had an absolute estate at law in the lands, and that the cestui que use had nothing but an equitable right, which courts of chancery only could make effectual. The power of a proprietor of lands at common law, to make such conveyances has never been questioned, and certainly, this power exists in the very nature of the title. I may give the use and improvement of my estate to one for years, and then to another in fee. Here the tenant for years, has nothing but the right to use, while the fee is in another person. By the same principle I may give my estate absolutely to one, to hold in trust for the use of another. In both cases, the use and the fee are in different persons.

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The statute of uses, has no more force in this state than the statute of Westminster the second, and our courts may as well make statutes at home, as import them from abroad. Here was a right existing at common law, to create a certain species of estate, and which never had been taken away by statute. No judicial tribunal can take away the right, without exercising legislative powers. To have been consistent, the court should have said, that a person had no right to make such estate, that nothing was passed by the conveyance, and the property was in the original grantor, but to deny him the right of making such an estate, and then vesting the property different from what he intended, is an assumption of power, on the part of the court, to make a disposition of a man's estate, not only without his consent, but against his will : for they might as well have directed this land to have vested in any other mode, as conformable to the English statute of uses.

That our progenitors considered the doctrine of uses, as settled by the statute of Henry VIII. to be law, at the time of their emigration, is at least problematical : for at that time, which was in the reigns of James I. and Charles I. it is a well known fact, that uses had been restored under the name of trusts ; and were then recognized by the courts of law, and effectuated by the courts of chancery. Our ancestors therefore, if they knew any thing of this subject must have had an idea, that trust estates were consistent with the law of England. But at any rate, it is a very far-fetched argument, indeed to say, that the idea of our ancestors respecting the operation of a statute in England, at the time of their emigration, shall be the rule to decide what the common law is, upon a case arising, one hundred and fifty years afterwards.

Considering our general regulations respecting landed property, there can be no reason for apprehending that any inconvenience as the court have suggested, tho they have pointed out none, could result from adopting the doctrine of uses. It therefore would have been better, and much more consistent with law, if Taylor had applied to a court of chancery, and obtained a decree, which unquestionably would have been in the power of the court, that Bacon should have released his right at law, to the children of Abigail,

for whose use he held it. This would have been no violation of the common law. A use or trust would then have been descendable, deviseable, transferable, and liable for debts, like an estate at law, and the trustee under the power of courts of equity, and compellable to make such conveyance, as justice required. Whether our courts in future, will consider this decision to be law, it is not probable will ever be determined ; as there is but little prospect that another such case will ever come before them.

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CHAPTER SEVENTEENTH.

OF TITLE BY DEVISE.

**A** Devise is a disposition of real estate in a man's last will and testament. The power of devising has been generally permitted by all laws but those of feudal origin. In England, lands were deviseable before the conquest, but the introduction of the feudal tenures, deprived the subjects of that right, until it was restored by statute in the reign of Henry VIII. At the time when our forefathers came from England, the power of devising, was possessed by the people, and they established it here in the fullest extent. Our statute law declares, <sup>d</sup> that all persons of the age of twenty-one years, of right understanding and memory, whether excommunicated, or other, (not otherwise legally incapable,) shall have full power, authority, and liberty to make their wills, and testaments, and all other lawful alienations of their lands and other estates, and that no wills or testaments, wherein there shall be any devise, or devises of real estate, shall be held good and allowed for any such devise or devises, if they are not witnessed by three witnesses, all of them signing in the presence of the testator.

In this place, it is not my intention to enter into a general consideration of wills, which will be reserved till I come to treat of personal property. I shall say nothing more concerning them than what is necessary to explain the law respecting devises.

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<sup>d</sup> Statutes 3. It is singular, that the word "excommunicate," should have been introduced into the statute, or continued in the revisions, when it is well known that there never was an ecclesiastical tribunal in this state that could denounce a sentence of excommunication, or any other decree, that could effect a man's civil rights.

<sup>e</sup> Statutes 123.

*f* All persons are capable of devising their estates, unless they are under certain disabilities or disqualifications. These are founded upon a want of discretion, or a want of capacity. *g* Infancy, disables a person to devise his estate, for want of proper discretion. *b* So idiocy and insanity, disqualify, for want of capacity. *i* Non-sane memory is a disqualification, founded on incapacity. It is not sufficient, that the testator be of sufficient memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he can make a disposition of his estate, with understanding and reason; which the law calls a sane and perfect memory. Restraint, menace, or duress of imprisonment, is a disqualification at common law, for the statute law expressly designates the other disqualifications, and then says generally, *not otherwise legally incapable*, which must refer to a common law incapacity. Thus if a man in his sickness, makes a will, by the over importuning of his wife, to the end that he may be quiet, this shall be said to be a will by restraint, and not binding. But there must be actual proof of some undue importunement or restraint of the devisor, to avoid a will regularly made. *k* If a person be under any of these disabilities, viz. infancy, idiocy, insanity, non-sane memory, or duress, at the time of the inception of the devise, it will be absolutely void, tho the disability be actually removed before the consummation thereof, by the death of the devisor, for a devise or will is such from the making, and therefore the parties must be qualified, and have ability at that time: and if the person, after the removal of the disability, declares that the will made during the disability shall stand, it is still void. A married woman in England is by statute disqualified to make a devise.—Our statute does not name a married woman, but generally, not otherwise legally incapable. So that a question has arisen lately, whether a married woman at common law, be disabled to devise her estate. In the case of Adams and Kellogg, where a married woman devised her lands to her husband, the superior court adjudged that the devise was void, because the devisor at common law was disabled to make it. This decision was afterwards reversed by the supreme court of errors, by which, the law is now settled, that a married woman may make a devise of her own lands, even to her husband.

*f* Pow. on devises, 138.  
*k* Ibid. 173.

*g* Ibid. 143.

*b* Ibid. 144.

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*i* Ibid. 145.



The statute law has prescribed no particular form for a devise ; of course any words that sufficiently express the intent, will be a good devise. Neither has the statute made it requisite by express words, that the will be in writing, or be subscribed by the testator. / But it requires that a will shall be witnessed by three witnesses, who shall sign in the presence of the testator, if it contain a devise of lands, to make the devise good. This clearly implies, that the will must be in writing : but points out no regulation respecting the signing of the testator, for thow we should suppose that the witnessing of the witnesses, must be to his signing, yet their witnessing to his publication would comply with the words of the statute. But it is understood, that all wills containing devises of lands, must be in writing, signed by the testator, whether at the beginning or end of the will is immaterial ; sealed as is commonly practised, tho not absolutely necessary, and witnessed by three witnesses, all subscribing their names in the presence of the testator, so that he may have it in his power not only to see them, but he must actually observe them. The witnesses must be legal, in point of character, for infamous persons, who have committed, and been convicted of the crimes which at common law disqualify persons to testify, cannot be witnesses to wills, and in point of interest, for a person who has any interest in the establishment of a will, as a legatee or devisee cannot be a witness. But it has been adjudged by the courts of law in England, in the cases of Wyndham, vs. Chetwynd, and Kindson vs. Keney, that a witness incompetent at the time of attestation, might purge himself afterwards either by release or payment, and become competent by the rule of the law.

All natural persons are capable of being devisees : as well as corporations, or bodies politic. But these last from their nature cannot make a devise. m Devisees may be ascertained by nomination, an actual naming of the persons, or by description, so that the person intended can be known. Description, may be by the name of dignity, or office, or by the name of reputation, or nearest of kin and the like. If the name or description be mistaken, yet if the person intended to take, be certain, the devise is good. Aliens cannot be devisees.

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Every person may devise any estate that he has in things real, and may create by devise, any kind of estate, excepting those which arise from the mere operation of law : and may empower executors to sell lands.

• A devise is deemed to be a conveyance, and therefore will transfer only such lands as the devisor owned at the time of making devise. Therefore if a man devises lands by particular description, and afterwards purchases them, or if he devises all the lands of which he shall die the owner, and afterwards purchases, the devise in both these cases is void, as it respects the subsequent purchases.

• A devise by a man to his heirs, to take in the same manner they would have done by descent, is void, and the heirs shall take by descent.

p A devise was made to a person, and his male heir in fee-tail, in succession forever ; the devisee died leaving two sons ; it was determined that the word heir is nomen collectivum, and signifies him or them who by law succeed to, and inherit the estate of another, and that it included both the sons, who should inherit as heirs at law.

q A devise may be void for uncertainty, and repugnancy : for it is a general rule in the construction of wills, that whenever there is an irreconcilable uncertainty or repugnancy in the disposition, made by the testator of his real property, the title of the heir at law shall be preferred to all others ; because where the court cannot ascertain beyond a doubt, the meaning of the testator, they must recur to the rules of descent, where there is no doubt. Uncertainty, and repugnancy may respect the thing devised, the quantity of interest meant to be devised, and the person intended to be the devisee. • A devise may fail of taking effect by the waiver, or refusal of the devisee. / The devisor after the inception, and before the consummation of a devise, may revoke by a disposition of the estate devised, or by a subsequent different devise, by a new will, or by codicil, or by a subsequent marriage, and having children, which is a presumptive revocation, that may be rebutted by proof, or by any alteration in the nature of the estate, by the act of the party, by a stranger, or by the act of the law.

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• Powell. Dev.      • Ibid. 431.      p Larrabe vs. Larrabe, Sup. C. 1793.  
g Powl. Dev. 411.      r Ibid. 442.      / Ibid. 532.

\* It is a general rule of law, that no parol declarations of the testator, may be offered in evidence to controul, or alter the written disposition of his estate, contained in his will, and that parol declarations shall not be admitted to explain, enlarge, controul, or rescind the language used therein, for the construction thereof is the proper business of the judge, and is restrained to arise out of the instrument alone. No proof can be admitted that the testator intended to create a different estate from what is expressed. If a man devise land to his wife, for the term of her life generally, no parol proof can be admitted, that he intended it by way of jointure, and in satisfaction of dower, because the whole of the will concerning lands ought to be in writing, and no averment ought to be taken out of the will, which could not be collected from the words contained in the will.

\* The law will admit the averment of the party, as to matters of fact, respecting wills, where the matter averred is consistent, and stands with the words of the will. Thus if a man has two sons, both called by the name of John, and supposing that the elder who had been long absent is dead, devised his lands to his son John generally, when the elder in fact is living; here the younger may alledge that the devise is to him, and may produce witnesses to shew his father's intent, that he thought the other to be dead, or that he at the time of making the will, named his son John the younger, and the writer left out the addition of younger; for this averment is consistent with the words of the will. So parol proof may be admitted to shew whether the instrument was meant as a will, or a deed. So if there be father and son, both called by the same name, and there be a devise to a person of that name, without distinguishing which, parol evidence may be admitted to prove that the devisor did not know the father, upon which the estate shall go to the son. If words of an equivocal sense be used, a parol averment may be admitted to direct the application. As where a devise was to a son by name, and his christian name was mistaken, but it was added in the service of the duke of Savoy, parol evidence was admitted to ascertain this son, and tho his name was mistaken he had the estate. But if the person be not in some manner

manner described in the devise, no averment will be admitted to shew who was intended, because in such case the ambiguity appears on the face of the instrument. No averment will be admitted to supply any thing, that is not written. If there be a blank in the will, no evidence can be admitted to prove how the testator intended it should be filled.

*w* Parole declarations of the testator, are likewise received in all cases to rebut the constructive declarations of a trust, put upon words contrary to the legal sense of them, which is rebutting an equity, for in such cases the estate is in the devisee, and the averment is in support of the letter of the will. So parole evidence may be admitted in all cases, to counteract fraud, because to decide otherwise, would be to make the rule instrumental in encouraging that, which it is its object to prevent.

Having finished my remarks on deeds and devises, I proceed to a consideration of some general rules respecting their construction.

1. \* That the construction be favorable, and as near the mind, and apparent intent of the parties, as the rules of the law will admit. For the maxims of law are, that the words ought to be subservient to the intention, and that writings be favorably interpreted on account of the simplicity of mankind. The construction therefore must be reasonable, and agreeable to common understanding.

2. That where there is no ambiguity in words, no exposition shall be made contrary to the words : but where the intention is clear, too strict a stress shall not be laid upon the precise signification of the words ; for he who sticks in the letter, sticks in the bark. Therefore by the grant of a remainder a reversion may pass, and so the reverse. Another maxim is, that bad grammar does not vitiate a writing ; neither false English, nor bad latin, will destroy a deed.

3. That the construction shall be made upon the whole deed, and not upon the separate parts ; that every part be made, if possible, to take effect : and that every word be made to operate in some shape or other.

4. That every deed shall be taken the most strongly against him who is the agent, or contractor, and in favor of the other party.

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5. That if the words will bear two senses, one agreeable to, and another against law, that sense shall be preferred which is most agreeable to law. As if proprietor in fee-tail, lets a lease for life generally, it shall be construed for his own life only, for that is consistent with the law : and not for the life of the lessee, which is beyond his power to grant.

6. That in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected ; but in a will, where there are repugnant clauses, the last shall stand : on the principle that the first deed, and last will, are always most available in law.

7. That a devise be most favorable expounded, to pursue if possible, the will of the devisor, who for want of advice, or learning, may have omitted the legal and proper phrases. The law therefore many times dispenses with the want of words in devises, that are absolutely essential in all other instruments. Thus a fee-simple may be created by devise, without the word heirs, and a fee-tail without using words of procreation, if it be apparent that such estate was intended to be created, & as a devise to a man, and his seed, or his heirs male, or any such expressions, evincive of his intent, tho in a deed an estate for life only would pass. The same may be said in respect of estates in remainder and reversion.

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#### CHAPTER EIGHTEENTH.

#### OF TITLE BY ESCHEAT.

**L**ANDS never escheat by reason of tenure, and of course there are no private persons who take lands on failure of heirs, as was done by the feudal lords, on extinction of inheritable blood in their vassals. Lands escheat to the state, on failure of heirs, according to the rules of descent, or when no owner can be found. \* The statute respecting escheats, points out the mode of procedure. The courts of probate are to secure such estates in the hands of administrators, by them appointed for that purpose, and to notify the state treasurer, who has power to dispose of the same, and to render his account to the general assembly annually. If any

\* 2 Black. Com. 115.    \* Statutes, 51.

any heir or owner should afterwards appear, they are entitled to the estate, or a reasonable compensation.

Lands escheat upon failure of heirs, and this happens where there is a complete extinction of inheritable blood, according to the law of descent.

An heir to a person, is he who on the death of such person, will by the law of descent succeed to his estate. This implies, that no person can be a complete heir of another, till the ancestor be dead, for it is a common maxim, that no one is the heir of the living. Before the death of the ancestor, those persons who are entitled to succeed to his estate, if he dies intestate, may be denominated heirs apparent, or presumptive heirs. All persons may be heirs, excepting monsters, bastards, and aliens.

1. A monster, is defined to be a creature born in lawful marriage, that has not the shape of mankind, and evidently has some resemblance of the brute creation. Creatures coming within this description cannot inherit. But then the deformity must be so great, that the being cannot be considered, as a part of the human species: for if the being, be created in human form, tho he be deformed in some parts of his body, as if there be six or four fingers, or the limbs are useless, or distorted, yet he may be a legal heir.

2. Bastards being children born out of lawful wedlock, or not within a proper time after its determination, cannot inherit.— They are considered as the sons or children of nobody, or of every body, and no inheritable blood flows in their veins. Lands therefore will escheat to the state, if there be no other relation to the last owner. Bastards can have no other heirs than the issue of their own bodies: for as they are considered as the children of nobody, there can be no ancestors, by which a kindred or relation can be made. Nor can the course of descents be traced through them. But they must be considered as beginning a new stock or family. The reason of excluding bastards from the right of inheritance, is on account of the uncertainty of their ancestors. But this rule is extended to cases where there is no uncertainty, as the mother of a bastard. Yet by the principles of the common law,

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If the mother dies, leaving lands, or the bastard, leaving lands, and a surviving mother, they cannot be heirs to each other ; but the estate shall escheat or go to the lawful heirs.

3. c Aliens or foreigners not belonging to this or any of the United States, are incapable of holding lands in this state, by virtue of a statute made for that purpose, and of course cannot be heirs. If then, a citizen of this state die possessed of an estate, in lands, and leave relations that are foreigners, either residing in this state, or in some foreign kingdom, they cannot inherit, but the lands shall escheat to the state. So if a citizen should leave remote relations that were legal inhabitants of this state, and nearer relations that were foreigners, the remote relations belonging here, must inherit in preference to the foreigners.

In respect however to the lands that were holden in this state by foreigners, at the time this act was passed, I presume that they will descend to the heirs of such foreigners, who shall continue to hold them till their death, in the same manner, as tho this statute had never passed.

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#### CHAPTER NINETEENTH.

#### OF TITLE BY EXECUTION.

THE mode of acquiring title to real property by execution, was not derived to us from the law of England, for there, a title to lands in fee simple, cannot be acquired by the levy of an execution. But they may by force of the statute of Westminster second, pray out an elegit, a particular kind of execution, by which half the lands of the debtor may be extended, and holden by the creditor until the debt be discharged. But in this state, by force of the statute, respecting the levying of executions, it has become a very common mode of acquiring the title to lands, by the levy of an execution. Whoever has an execution against a debtor, owning lands, may levy the same on them, provided the debtor is unable to discharge it by the payment of the money, or cannot tender sufficient personal estate to satisfy it. The creditor however has no legal right to levy on real estate, if personal can be had. He has the right  
or

of election, respecting the taking of lands, and the debtor cannot tender them on the execution, to save his body from imprisonment : the creditor may elect, to take the body, or lands, but if personal estate can be found, it must be levied upon in preference to either. The officer cannot levy the execution on lands, without the express direction of the creditor, tho they are inserted in the execution.

The mode of proceeding being clearly pointed out by the statute in this case provided, it will be sufficient to recite that part of it which relates to this subject. *4* By this act it is enacted, that all lands and tenements, belonging to any person in his own proper right in fee, shall stand charged with all the just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for the same, where the debtor or his attorney shall not expose to view, and tender to the officer personal estate to answer the sum mentioned in the execution, with all charges. And all executions duly served upon any such houses, or lands, being with the return of the officer thereon, recorded in the records of lands in the town wherein such houses or lands are situate, shall make a good title to the party, for whom they were taken, his heirs and assigns forever : and whenever any execution shall be levied on lands, the same shall be appraised by three indifferent freeholders of the same town where such lands lie, or if that town be a party, then of the next adjoining town, one of whom may be chosen by the debtor, and another by the creditor, and if they do not agree in chusing a third, or if either party neglect to chuse, the officer shall apply to the next assisant or justice of the peace, who by law, may judge between the parties in civil cases, which authority, shall appoint one or more appraisers, as the case may require, which appraisers shall be sworn according to law, and it shall be the duty of the officer who levies such execution upon the lands, to cause the execution, with his endorsement thereon to be entered on the town records as aforesaid, before he returns the same into the clerk's office of the court out of which it issued, and the officer shall have two shillings for causing the same to be recorded, with additional fees for his travel.

The Statute contemplates the levy of executions upon lands  
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*4* Statutes, 62.



holden by the debtor in fee, without mentioning any lesser estate. But it is clear, that where a debtor holds a less estate in lands than a fee, the execution may be levied on the same, in the manner as the statute directs in case of an estate in fee, by force of which, the creditor will acquire all the title which the debtor had in it, in the same manner, as he might by a deed describing it as an estate in fee, and would have right to occupy and improve the same during the full term, to which the debtor was entitled. So the execution may be levied and proceeded with in the same manner as in cases of levies on estates in fee : and in the return of the officer, the particular estate which the debtor has, may be described and appraised according to its value, having regard to its continuance, which levy would unquestionably convey to the creditor, the estate of the debtor : But then in all cases, where a levy is made upon lands, in which the debtor has an estate, less than a fee, the whole estate of the debtor must be taken, set off, and appraised : for our law will not admit that a levy should be made for any particular number of years, which are or may be less than the estate of the debtor, by which it would at the expiration of the time, for which it was taken, revert to the debtor. But the whole estate must be taken, and may by the appraisers be estimated according to its real value.

Neither does our law admit the levy of an execution on lands, to be holden till the rents and profits discharge the debt.

A question has often arisen with respect to the power of creditors, to take by execution, crops growing on lands, which are cultivated by tenants at will, or by sufferance, or on short leases. An idea has been entertained, that the execution may be levied on the crops of grass, or grain, or any thing else while growing, and that they may be severed and sold as personal estate : but the law will not warrant such a levy. In all cases where a tenant at will, or by sufferance, or on a short lease, has grain or grass or any other thing growing on the land, he has by law a right to all such use of the land, as will be necessary to take the benefits of his grain, or grass that is growing. While growing it is considered as a part of the realty. The only mode of course of proceeding against such tenant, to obtain such estate by execution, must be by  
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levying upon the lands, and taking the whole of his estate however short or long the duration may be, and by force of such levy the creditor will acquire the same right, to gather the crops of the debtor, as the debtor had. But execution cannot be levied on grafs, or grain while growing, because it is annexed to the realty, and such levy can give the officer no right to enter on the land of another, to harvest the grain, and carry it away. All crops belonging to any other person, than the owner in fee, are annexed to the freehold, and therefore cannot be considered as personal estate. But his right to carry them away, may be levied upon, as well as any other estate less than a fee.

*e* It has been determined, that the levy of an execution on a leasehold estate, for the term of nine hundred and ninety-nine years, is good, and that such a term is to be appraised, and not sold at the post. This decision, fully recognizes the doctrine before laid down of the levy of executions on estates less than fee simple.

*f* In an action of disseisin, the plaintiff claimed by the levy of an execution, to which the defendant made the following exceptions; that there was a written agreement, that the execution should not be taken out so soon as it was by two months, that the justice who appointed one of the appraisers, was not the nearest justice to the land, that the appraiser appointed by the debtor, and agreed to by the creditor, was tenant to the debtor, and not an indifferent freeholder: but the court determined that the written agreement was not admissible evidence to defeat the title of the plaintiff, that by next, the law did not strictly mean the nearest, but some in the town where the land lies, if there be none there, then the next living out of town: and that the tenant of a party was not excluded by law, from being an appraiser: and where the parties had knowingly agreed upon him, they are estopped to say he is not indifferent, especially the debtor, whose tenant he is, and who chose him.

*g* It has been decided, that where a person obtains a judgment against an absent debtor, and prays out execution, without giving bonds to refund according to the statute, and levies his execution

on

*e* Man vs. Carrington, S. C. 1793. *f* Cheesborough vs. Clark and Fanning S. C. 1789. *g* Marey vs. Ruff, S. C. 1790.

on lands, that such levy is good, tho no bond was given, for the provision of the statute is in favour of the debtor only, and not of creditors.

c It has been adjudged, that if the creditor and debtor agree on appraisers who are not freeholders in the town where the land lies, that the levy of the execution will be void, because the agreement of the parties cannot alter the law.

d A levy of an execution on lands, has been adjudged to be good, tho it did not appear from the officer's return, that he had made a previous demand of satisfaction of the debtor. But it appeared that the debtor appointed one of the appraisers, by which it might be presumed, that the demand was made, or the debtor agreed to wave it ; but regularly such demand ought to appear from the return of the officer. e A creditor levied execution on lands, and procured the levy to be recorded in the office of the town clerk, but neglected to procure it to be recorded by the clerk of the county court, till after another creditor had procured a levy of an execution on the same land, and caused it to be recorded with the town and county clerks. The last levy was held good, tho the creditor knew of the prior levy, because the statute is express and positive, that the levy must be recorded by the clerk of the court whence the execution issues, to make it valid.

#### CHAPTER TWENTIETH.

#### OF TITLE BY POSSESSION.

BY our law, in no instance can a man obtain even a temporary title to land by occupancy, on the principle that it has assigned no legal determinate owner : but where the owner neglects to keep possession of his lands and permits a person to occupy it, for the term of fifteen years, without enforcing his claim, such occupant during this time, is deemed a trespasser, but at the expiration thereof, his occupancy becomes transformed into a title, which the original proprietor cannot defeat.

In a review of the system of our laws, we find that it has been the

c Chapman vs. Griffing, S. C. 1790. d Topliff vs. Davis, 1793.

the policy of the legislature to narrow the sources of litigation by a variety of statutes of limitation. For the purpose of avoiding suits, respecting controverted titles to lands, and to reduce them to the utmost simplicity, we find a statute enacted in a very early period of our government, that limits our researches for titles to lands to the short period of fifteen years.

The statute in substance enacts, that any person who has any right or title of entry into any lands or tenements, withheld from him, shall not make entry into the same, but within fifteen years next after the right or title thereto shall descend or accrue to him ; and in default of such entry, such person and his heirs, shall be utterly excluded and disabled from ever making the same after that time. In this statute there is a proviso in favour of infants, feme-coverts, married women, persons non compos mentis, imprisoned, or beyond the seas, at the time the right or title shall descend or accrue, and of their heirs—and they may notwithstanding the expiration of the time of fifteen years, bring their action, or make their entry : but this must be done within five years after arriving to full age, discoverture, recovering their reason, enlargement out of prison, or coming into New-England, or the state of New-York, and their heirs must make their entry, or bring their action, within five years after the death of the person, in whose right they claim, and at no time afterwards.

The expression of the statute taking away the right of entry, we should at first blush suppose intended nothing more than to drive the person to his action at law, and only exclude him from substantiating his claims by his own act of entry. For at common law a person may be debarred of his right of entry, and yet have a right of action : as where disseisor dies, and the land goes into the possession of his heirs, the proprietor is excluded from his entry, and driven to his writ of right. But we must consider that by our law every person who has the right of property in lands, has the right of entry, as well as the right of action ; that therefore the exclusion of the right of entry, by a parity of reason, shall exclude the right of action ; and tho the first part of the statute says nothing ref-

pecting actions, yet in the proviso of the statute made in favour of persons under certain legal disabilities, the right of action, as well as the right of entry is taken away, after the expiration of the limited time. This clearly manifests the intent of the legislature, and the uniform construction of the courts of law has been, that the statute in all cases takes away the right of action as well as the right of entry.

A person to acquire title by possession, must have the actual occupancy and improvement of the lands. It is generally understood that they must be inclosed with a fence to give such a possession as the law contemplates. This unquestionably is the most conclusive evidence of possession, but it is possible, that a person may have the actual improvement of uninclosed land in such a manner as to amount to possession, and be capable of legal proof: as where a man constantly takes his fire wood from timber land, and takes care of it as his own. For the law goes on the principle, that a total dereliction of property on one part, and an uninterrupted exercise of the acts of ownership on the other part, is the rule to decide the title. But where the lands are uninclosed, and neither party can be said to be improving, the law considers the real owner to be in possession.

A person to acquire this title to lands, must hold the possession by a title or claim adverse to and independent of the proprietor, for where a person enters by the consent of the owner, and can even by implication be considered as holding under the true owner, the possession shall not be deemed adversary, but the possession of the true owner, and no title acquired by it. For the possessor is supposed to deny the right of the owner, and the owner to relinquish it. Therefore where there is an implied recognition of the rights of the owner, the possessor is acquiring no title. Therefore in case of a mortgage deed, as a security for money borrowed, if the mortgagor continue in possession, for more than fifteen years, yet he is in, by the consent of the mortgagee, holding under him, and he shall never acquire a right of possession against his deed.

The law considers the owner abandoning his property, as a  
forfeiture

forfeiture of his title, but does not expressly decide in whom it shall vest : but the implication necessarily is, that the person who happens to be in the possession at the time the owner is divested, must become vested with the property. He has a right to hold the estate against the former owner, as well as every body else. As the property does not escheat, and as there must be an owner to every thing, the consequence is, that he acquires the title. The law does not require that the possessor at the expiration of fifteen years, should have had the occupancy during the whole of that period, to give him the property. It is sufficient, that the proprietor has been out of possession during that time, and tho there may have been a number of persons occupying during the time, yet the possessor at the expiration of the fifteen years, must receive the title at the moment it passes, by operation of law, from the proprietor. The law therefore cannot be supposed to require that peaceable and uninterrupted possession, on the part of the possessor, as is required at the common law in the acquisition of rights by prescription. Yet where the owner keeps up his claim by entry, or by bringing actions, so that there cannot be supposed to be an abandonment of his right, the statute will not run against him. So where there are joint tenants, tenants in common, or coparceners, and one of the tenants is under either of the disabilities, provided for in the statute, so as to save his right, this shall save the right of all the tenants, tho under no legal disability, because the estate being joint, the saving of it for one, must save it for all.

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CHAPTER TWENTY-FIRST.

## OF TITLE BY FORFEITURE.

**B**Y the laws of England, a person forfeits all his estate, both real and personal, for almost every crime that can be committed. This extreme severity probably arose from the ferocious, and vindictive spirit of the age in which the laws were made : but in this state, the enlightened minds of the people, revolted at the ideas of cruelty and barbarity in the punishment of crimes. They were satisfied with punishing the offender without extending the punish-

ment to his innocent family, and adding to their misfortunes, by plunging them into poverty. Influenced therefore, by these humane and benevolent sentiments, the legislature, has in one instance only subjected a criminal to the loss of all his estate. \* This is for the crime of burning, or attempting, or conspiring to burn public magazines, or vessels, or betray public vessels to the enemy in the time of war. This crime works a forfeiture of the offender's estate, both real and personal, at the discretion of the superior court. This is the only crime for which real estate can be forfeited, and this and man-slaughter are the only crimes which work a forfeiture of goods and chattels. In all other cases, the statute concerning the age, ability, and capacity of persons declares, that such persons as are condemned to death, the charges of their prosecution, imprisonment and execution, being first paid out of their estates, the remainder shall be disposed of according to law. Where the crime is not punishable with death, the criminal holds his estate, after paying, his fine (if that be the punishment,) and the costs of prosecution.

During the late war with Great-Britain, all persons that were adjudged guilty of the crime, of having voluntarily joined and put themselves under the protection of the enemies of the United States, forfeited their lands to the state. But this was only intended for a temporary law.

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## CHAPTER TWENTY-SECOND.

### OF TITLE BY ACCESSION.

**T**HE principle of the law is to assign to every thing capable of ownership, a certain and determinate owner ; and to leave nothing to be acquired by occupancy, which is the original foundation of all property. Therefore in cases of alluvion and dereliction of the sea and rivers, which are a gradual accession of property, the law has determined that the person who owns the thing, to which the accession is made, shall be entitled to the accession. I have therefore considered this as a title acquired by accession, and have ventured to treat of it under that name (as it was not reducible to any

\* Statutes, 66-

any former head) for the purpose of illustrating every principle of importance, that respects our landed property.

1 Alluvion is an imperceptible addition made to lands by the washing of the sea, or rivers, and the addition must be so gradual that it is impossible to ascertain how much ground is added in the space of each moment of time. Thus the gradual alteration of the course of a river, will add to one and diminish the other bank. Where this change is so gradual, as not to be perceptible in any one period of time, the proprietor whose bank of the river is increased is entitled to the addition. So where the sea washes up the sand, and gradually makes firm ground, the adjoining proprietor is entitled to the addition.

2 Dereliction is where there is gradual subsiding of the sea, below the usual watermark, in which case—if it be imperceptible at any one period of time, the adjoining proprietor is entitled to it. For the purpose of explaining this subject, it is necessary to consider, in whom is the property of the ocean and the rivers.

All rivers not navigable, belong to the proprietors of the land in which they flow. If their be adjoining proprietors on a river not navigable, and such river be the dividing line, each proprietor owns to the center of the river. This has been adjudged in cases, where the proprietors in the original grants to them were bounded upon the river. Hence, it may be said to be a principle of law, that all streams not navigable, are owned by private persons, and that they have the same power to exclude all persons from the use and improvement of such streams, as they have from using their lands.

All rivers that are navigable, all navigable arms of the sea, and the ocean itself on our coast, may in certain sense be considered as common; for all the citizens have a common right to their navigation; but all adjoining proprietors on navigable rivers, and the ocean, have a right to the soil covered with water, as far as they can occupy it, that is to the channel, and have the exclusive privilege of wharfing and erecting piers on the front of their land. Any person therefore has a right to sail through the water, that covers the land of another, without being liable for a

trespass

1 Justinian's inst. l. ii, tit. 1, sect. 20,

2 Black. Com. 261.



trespass, in the same manner, as one may pass through the air which is above the land of another: but no man has a right to do any act in the navigable waters, upon the front of another's land, which can affect the soil, as wharfing, or erecting piers: for in this there is an exclusive property, tho there is not in the water.—Nor may adjoining proprietors erect wharves, bridges, or dams across navigable rivers so as to obstruct their navigation.

\* Having considered who are the proprietors of the sea and of rivers, I proceed to remark, that in rivers where the alteration is not gradual, as in alluvion, but is sudden as an avulsion, or where a part of one bank is violently torn away, and carried and annexed to the other, then the proprietor from whose bank such land is torn, shall continue to own it, because he is able to distinguish and ascertain his property. In all rivers not navigable, it is clear that the adjoining proprietor or proprietors shall own all islands that may arise. If there be two proprietors owning on each side the river, then if the island rises in the middle of the stream, it shall be divided between them: if on either side, then the proprietor to whose bank the island is nearest shall own it. But if a river divides itself and afterwards unites again, by which it reduces a tract of land into the form of an island, the land still continues in him to whom it before appertained.

• If there be a sudden dereliction of the sea, by which a large tract of firm land is formed, or if islands appear in the ocean, or in navigable streams, such lands and such islands, are the property of the public, because they spring out of the ocean, and navigable rivers, which are public property. ¶ By the Roman law such islands arising in the sea, would belong to the first occupant; and the islands arising in navigable rivers to the adjoining proprietors, in like manner, as by our common law in streams not navigable. This is the only material difference between the common and the Roman law, and it is apparent that the principles of the common law respecting alluvion was borrowed from the Roman code.

¶ If a river not navigable should suddenly change its channel, the deserted bed of the river would be the property of the adjoining

\* Justinian's Inst. L. II. Tit. I. Sect. 27, 22. 2 • Black. Com. 262.  
 ¶ Justinian's Inst. L. II. Tit. I. Sect. 22. 2 Black. 262. ¶ Ibid.

joining proprietors, in like manner as they own the river : but if a navigable stream should suddenly desert its channel, and form a new, it would be reasonable that the proprietors of the land through whose land the new channel is made, should have the old channel, as a compensation for the loss of their land, which becomes public property by the flowing of the river through it.

Having considered the right of property in the ocean, and in the Rivers, it may not be improper in this place to consider the right of fishery.

The right of fishery must clearly follow the right of property in rivers, and seas. In all rivers and arms of the sea, not navigable, the adjoining proprietors have unquestionably the exclusive right of fishery. Tho they cannot be said to have a property in the fish swimming in the stream, and before they are caught, yet they have the exclusive right to take them, and whoever disturbs that right is a trespasser. Of course if a person takes fish in a river not navigable, without going on to the land of the adjoining proprietor, he is a trespasser ; and this principle is necessary to establish exclusive property in individuals, to prevent the inconveniences which will necessarily arise from the operation of that erroneous opinion that fishing is common.

Tho it may be considered as a general principle, that in navigable rivers, and the ocean, the right of fishery is common, yet it is under this restriction, that every proprietor is deemed to have the exclusive right of fishery in rivers, and seas adjoining his land, so far as he has the right of the soil, that is, to the channel ; and that no person may take oysters, or any shell-fish from their beds, in the front of another's land, or draw a sein for other fish within the limits above described, tho he does not for that purpose, enter upon the lands of the adjoining proprietor. In an action of trespass for fishing, by drawing a sein in a navigable river, upon the front of another's land, tho it appeared that no entry was made upon the land of the adjoining proprietor, yet it was held, that the action was sustainable in his favour.

The taking of fish in this state, is regulated by a great variety of statutes

statutes, in such a manner as to give to the proprietors adjoining on rivers the fairest and most equal chance of fishing, upon all parts of the rivers, but they are too numerous to be explained in in this place.

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## CHAPTER TWENTY-THIRD.

### OF THINGS PERSONAL.

**T**HINGS personal, are of a moveable nature, and may be transported by the owner wherever he pleases. They also include a species of property already mentioned, which is of a real as well as personal nature, comprehending the immobility of the one, and the limited duration of the other, as estates for years. This might with propriety be considered, as a distinct species of property, but has ever by writers on the law, been treated as a branch of things personal. To obtain a clear understanding of this subject, we must consider that things personal are also called goods and chattels. Chattels are divided into chattels real and chattels personal.

Chattels real, are said to concern or favour of the realty. They are a kind of an estate which may be had in things real, inferior to a freehold : such are estates for years, at will, and by sufferance. They are interests annexed to, and issuing out of real estates. They possess the immobility of things real, which has given them the denomination of real, but as they are of a limited duration, they are considered as partaking of a quality of moveable things, and of course they are called chattels real. This subject we have fully handled in the foregoing part of our enquiries, and it is mentioned here only, to display the connexion between the different branches of our system of jurisprudence.

Chattels personal, are properly things moveable. They contain all those things in which a man can have property, that are capable of being removed, from place to place, and attend the owner wherever he goes. But we must here observe, that there are many things annexed to the freehold, which are capable of being severed and transferred from place to place, as corn and fruits of every

every kind. So long as they are annexed to the freehold, they are considered as part and parcel of the realty. But when they are severed, they are considered as things personal.

Property in chattels personal, or things moveable, may be either in possession, or in action. Property in things personal in possession, is where the owner has not the only right to enjoy, but the actual enjoyment. Property in action, is where the owner has nothing but the naked right to enjoy, unaccompanied with actual possession and enjoyment.

I. Of chattels personal in possession, a man may have an absolute right of property, and a qualified, limited, or special right.

1. *f* A man may be said to have an absolute property in a thing in possession, where he has the sole exclusive right and occupation. Such property may be had in all inanimate things. So absolute property may be had in all animals of a tame and domestic nature. Such as horses, kine, sheep, poultry, and the like.—For a man may have as absolute possession of such animals, as he can of inanimate things, and they never go out of his possession, unless by accidental straying, or a tortious taking, in which cases, the owner does not lose his property. The stealing of domestic animals, is punishable as a crime.

In regard to the offspring of domestic animals, it is the general rule, that they belong to the owner of the mother or dam, on account of the uncertainty of the male, and the expense of supporting her, and her uselessness during the time of pregnancy. An exception is made in the case of swans, the offspring of which is to be equally divided, because the same attention is requisite in the male and female, and this rule must apply to all animals that associate in pairs.

2. *f* A person may have a qualified, limited, or special property to certain things in possession. This qualified property may be had in animals of a wild nature, and tameable disposition : but an absolute property can never be acquired in them. Where a person has by art, industry, and education, reclaimed an animal from its wild state, and rendered it tame, so that it remains quietly, in

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*f* 2 Black. Com. 384.

*f* Ibid. 371.

his own custody, or where a man has confined an animal in his own immediate possession so that he cannot escape, he thereby acquires a qualified property in it. But these rules apply only to those animals which usually are wild, those animals which we continually find tame, tho they might originally have been wild, yet they are now considered as being subject to absolute ownership.

Animals of a wild nature are of two kinds : those which are of a tameable and those which are of an untameable disposition.—Tameable animals may by the art and industry of man, be so far reclaimed from their wild state, as to remain voluntarily in the possession of the owner, and if they wander out of his possession, they have the inclination of returning, and will return again of their own accord. While animals of a wild nature possess this disposition of returning to their owners, tho permitted to go at large, yet they are considered as their property : but when they lose their disposition of returning, and gain their natural liberty, the owner becomes divested of his qualified property. This qualified property comprehends deer in parks; hares or rabbits in warrens, and doves in a dove house. Animals of a wild nature, and untameable disposition, cannot be considered as the property of any person, only while they are confined by him and are in his actual possession and power. When they are at large, the property ceases, and they may be taken by any person, unless the owner should immediately pursue them on their escape, and then he will undoubtedly have a better right to retake them, than any other person.

Every species of wild animals is subject to this qualified property on being reclaimed or confined : and when they become wild again or escape, any person may acquire in them the same kind of property. A qualified property may be had in bees, when reclaimed and hived, but reducing of them to possession, by hiving them, is necessary to obtain a property in them. It is therefore said, that if a swarm light on my tree, the property is not mine, till I have hived them, and if another person do it, he will gain the property. If a swarm fly from my hive, they continue mine, so long as I can keep in sight and pursue them : but when I have lost them, so as

so be unable to shew that they went from my hive, the property is gone.

\* It has been adjudged by the superior court, that a man's finding a hive of bees in a tree, upon another man's land, gives him no right to the tree or the honey, and that a swarm going from a hive, if they can be followed and known, are not lost to the owner.

This qualified property in animals of a wild nature, may be defeated by suffering them to go at large, and regain their native wildness : but while it continues, it is under the protection of the law, and an action will lie in favour of the owner against any person that injures, kills, or detains them. This difference however is made, where the animals are fit for food, and of real benefit to the owner, it is a crime to steal them, punishable by law : but where the animals are kept merely for curiosity, as dogs, cats, apes, parrots, and singing birds, the secret taking of them, can never in the eye of the law be deemed theft : because their value is not intrinsic, but merely ideal, depending on the whim of the owner. Such violation of this property, is a trespass, and an action will lie to recover damages.

A person is said to have a qualified property in animals on account of their inability. As when birds build nests on trees, or any wild creatures make their holes in a man's land, and have their young there, the owner of the soil has a qualified property in such young animals, till they are capable of flying or running away, and then the property ceases. If any person should take or destroy them, they would be liable to an action of trespass. So if a swarm of bees should take possession of a hollow trunk of a tree on my land, and should there deposit their honey, tho I could not have a qualified property in the bees, because they could remove where they pleased, yet I might in the honey, and any person who should cut down such tree and take the honey, would be a trespasser and liable to an action.

w The only kind of wild animals, which our law protects in the possession of the owner, are deer. A person for killing or destroy-

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 \* *McCrills vs. Goodwin*, 1790      w *Statutes* 36.

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ing deer in a park, incurs a forfeiture of seven pounds, and the value of the deer, and a fine of thirty shillings : and for pulling down a park, thirteen pounds besides the damages. No person may kill a deer within two miles of a park under the penalty of ten pounds.

A man may have a qualified property in the elements of fire, of light, of air, and of water : this however can subsist only, while he has the actual use and occupation of them, for they being of a fugitive nature, he cannot have the same permanent property as in land. If a person has the actual use of them, and his possession is disturbed, action will lie to recover damages.

If one obstructs another's ancient windows, or corrupts the air of his house or gardens, fouls his waters, or unpens and lets it out, or diverts a water course, the law will give the party injured just damages. This property however subsists only while it is in actual possession, and when it goes out of possession it becomes common again.

A man may have a special or limited property in things capable of absolute ownership, on account of the particular circumstances of the owner, as in case of bailment or delivery of goods to another, for some special purpose, as to carry to some place or to keep safely. Here can be no absolute property because the right and the possession are separated, one having the right, and the other only a temporary right to possess, accompanied with actual possession. The owner is said to have a general property, and the possessor a special property, and in case the things are damaged, or taken away, both have a right of action, the bailee on account of his immediate possession and responsibility to the owner : and the bailor, by reason of his right of property. But one action however can be supported in such cases ; the recovery of one will bar the other. So in cases of goods pledged, or pawned upon certain conditions . Both pawner and pawnee have a qualified, but not an absolute property till the conditions are performed or violated, and then an absolute property is vested in one, or the other. So in cases of attachment, the officer has a qualified property in the estate attached, and may maintain an action for the recovery

recovery of it, if taken away. So an executor or administrator has a qualified property in the goods of the deceased, and may maintain actions for their recovery : but the general property rests in the heirs, legatees, and creditors. But a servant who has the care of his master's estate, has neither the property nor possession, qualified or absolute, but only a mere charge and oversight, and of course, the possession of the servant, is the possession of the master.

II. \* Of things in action ; which are, where a person has not the possession and enjoyment, but a right to possess and enjoy the thing in question, and which is recoverable by action.

Wherever a man has a challenge or demand upon another, for a matter of debt or damages, it is called a thing in action. There is a naked right to something, it is merely ideal, and exists only in contemplation of law. This right of action may however be exerted and obtain substantial estate, which is called, reducing a thing in action into possession. All debts due by specialty or simple contract, all promises express or implied, are things in action. The contracts of mankind may be branched into an unbounded variety, and the injuries which individuals may receive from each other, cannot be enumerated : for all these the law has furnished remedies ; and while the mere rights exist, they are called things in action. These rights may be carried into effect by bringing suits, by which substantial property may be acquired in satisfaction of damages. A thing in action cannot be transferred by our law, so as to place the party to whom the conveyance is made, in the same situation with the original party.

I shall close my remarks on this subject, by observing that a right to personal estate may be created to commence in future, that by will, personal estate may be given to one person during life, and then to another forever ; and that the same article may be owned by a number, as joint tenants, or tenants in common, in which case they must all join in any suit respecting it.



## OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE have considered the nature of things personal, and now proceed to treat of the various titles by which they are holden. The original title to property has already been remarked, to have been occupancy : and since the establishment of civil society, all the other modes have been introduced for the purpose of rendering the possession of property safe, and to prevent the disputes that must constantly arise in a recurrence to the original, natural right. But as there are some instances, in which it is difficult to designate the particular owner, it is necessary to resort to the natural title of occupancy. Yet in all such cases the law has pointed out the circumstances under which the right may be exercised, so as to prevent any controversy or doubt.

I. It is considered as a principle of the law of nations, that any body has a right to seize and appropriate to his own use, the goods of an alien enemy : for when nations are at war, it is considered as consistent with justice and good policy, to annoy each other by every possible mode. Nor can it be strange, that such a principle has been adopted, when we consider, that in the early ages of mankind, and among all barbarous nations the great object of war has been plunder. This has been exemplified in a striking manner, by the conduct of the European nations in the dark ages, when whole nations engaged in the business of piracy, like the modern states of Barbary. This unquestionably is the origin of the present practice of privateering, which has however been systematized by regulations of law, tho not defensible upon the principles of moral right. Private persons are not supposed to possess this power, but it resides in the supreme government of the nation, who may grant commissions to private persons, to make captures on the high seas, of the property of the enemy ; and then such property so taken, shall vest in the captors. If an alien enemy bring goods into the country, after declaration of war, they are liable to be seized, unless he comes under the protection of a passport, or safe conduct. But if an alien enemy, chance to  
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be in the country, at the time of the declaration of war, his property is not exposed to be taken. But as the laws respecting privateers and letters of marque, are derived from the law of nature and nations, it will not be expected that I enter into any further investigation of this subject, in this place.

2. The title to waifs, strays, lost goods, wrecks, and treasure trove, is founded in occupancy ; the first, and last are regulated by the common law, and the other by statute.

1. Waifs are goods stolen and waived, or thrown away by the thief in his flight, for fear of being apprehended. If the owner can be known, the goods belong to him, but if no owner can be found, then to the first occupant.

2. Treasure trove, is where any money, or coin, silver, plate, or bullion are found hidden in the earth, or some private place, the owner thereof being unknown. Such treasure belongs to the first fortunate finder : but if the owner be known, or can afterwards be discovered, it belongs to him. In England it is true, that waifs and treasure trove belong to the king ; but in this state as we have no statute regulation, I presume, that the common law right of the first occupant, must be established.

3. \* In respect of strays and lost goods, it is enacted by statute, If any person take up any stray beast, or find any lost goods, worth two shillings, the owner being unknown, he shall carry a true description, with the natural and artificial marks, to the register of the town, where found, within fourteen days, on penalty of forfeiting the value of the goods, or stray beast, one half to the complainant and the other half to the town treasury. The register is to record the description and the name of the finder, and holder of the goods, or stray beast. If the owner appear in six months, and evidence his title to the property, it shall be restored on paying necessary charges, to be determined by the next assize or justice of the peace. If no owner appear within six months, the register appoints two freeholders, who under oath, estimate the value of such goods or beast in money. If the owner appear in six months afterwards, make good his claim, and pay the necessary expenses

\* Statutes, 238.

expenses, he shall have restitution, or the value according to the appraisement at the election of the finder. If no owner appear in twelve months and a day, the value according to the appraisement, after deducting just fees, to the keeper, finder, and register, shall belong to the town treasury, where such goods or beast were found : and the selectmen are impowered to recover and receive the same. The goods or beasts are to be at the risque of the owner the first six months, the keeper being faithful in his care of them ; and no beast may be taken up as a stray, unless found in a suffering condition.

4. " The statute concerning wrecks of sea, enacts, that if any ships or other vessels, shall suffer shipwreck upon our coasts, no violence or wrong shall be offered to persons or goods : but their persons shall be harboured and relieved, and their goods preserved in safety, till proper authority be informed, and give directions. That whenever any shipwrecked property shall be discovered on any of our coasts, it shall be the duty of the selectmen of the nearest town, and lawful for any person to take the most effectual measures to save and secure the same, and if need be, such person may apply to an assistant or justice of the peace, who is authorized to issue his proper warrant to some proper officer, to impress and call forth necessary assistance. Such persons securing such property, shall immediately give notice to the judge of the county court in that county, who shall direct the sheriff to seize the same, and keep it till disposed of by order of said court. That if any owner entitled by the laws of the land, or the laws of nations, shall appear within a year and a day after such seizure, and claim the same, it shall be restored upon his paying such reasonable costs and salvage to the person to whom it is due, as said court shall order and allow. But if no owner appear within the time, make claim, and pay costs and salvage, such property shall be sold by order of said court, and the avails thereof, be lodged in the state treasury, after deducting reasonable costs and salvage for the persons to whom due. If the property be of a perishable nature such court may at discretion direct it to be sold, within the limited time, and retain the avails for the same purposes : and if no owner appear in a month, to pay salvage

salvage and cost, the court may at any time afterwards sell sufficient to pay the same.

3. The benefit of the elements of light, air, and water, may be taken and holden by occupancy. If a person has an ancient window that overlooks his neighbour's ground, his neighbour has no right to erect another building so contiguous to it, as to obstruct the light : but if a person erect his house close by the wall of another, so as to be incommoded by it, or close by his house so that the light be obstructed, he cannot compel him to pull down the wall, or the house ; for the owner of the wall is the first occupant, and he having claimed his right, cannot be deprived of it. If a man should erect a tan-yard, or exercise any noisome trade, so near the house, or gardens of another, as to corrupt the air, and raise noxious stench and unwholesome steams, an action will lie against him in favour of the person injured ; but when a man has once erected such buildings, and is in the exercise of such trades, and another person fixes his habitation so near, as to be offended thereby, he cannot maintain an action, because the other person had the prior right by occupancy. If a stream of water flow thro a person's land, he has a right to take every natural, and artificial advantage of it, by erecting water-works, or flowing his land, provided he does not wholly divert the water-course, and deprive the adjoining proprietor, on the stream below, of water for necessary and ordinary purposes, as drink for his cattle.

4. The property of animals of a wild nature, while they are so, is acquired solely by occupancy. Any person has a right to take, and to kill all wild animals ; when he has taken them, he acquires a qualified property, and when he has killed them, he acquires an absolute property, and is by law protected in the possession of them.

In England, and the European kingdoms, many wild animals, or as they are denominated, game, are by special prerogative vested in the king and nobility, as hunting is esteemed too princely and noble a diversion for the people at large. The game-laws, which are calculated to preserve the game, bear exceeding hard upon the liberty of the subject. But in this state, the spirit of the people has

never been broken down by such tyranny and oppression. Hunting, fowling, and fishing, are considered as proper diversions for every class of people, and may be said to be free. These sports are laid under no restraints by law, and the people may enjoy them as they please, without restraint or danger of incurring any penalty. To hunt on another's territory, is a common custom. No action will lie in favour of the owner of the land, for any injury for the act of hunting, because the animals which are killed, being wild, cannot be his property. If any action can be maintained, it must be for the injury done by entering on the territory of another without his consent, and the damage to his possessions. For this unquestionably an action would lie, as in legal consideration it is a trespass. *b*

5. *c* Accession is a right of property grounded on occupancy, and herein the common law is copied from the civil law. Thus if any given corporeal substance, receive any accession, by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood, or metals into vessels and utensils, the original owner is entitled to it under such state of improvement, but if the thing itself be changed, by such operation into a different species, as by making bread out of another's wheat, there the property is changed, it belongs to the new operator, who is to make satisfaction to the former owner, for the things he has converted. It has been held that if one takes away another's wife or son, and clothes them, and afterwards the husband, or father retakes them, the property of the garments shall cease to be in him, who provided them, because they are annexed to the person of the woman, or child.

6 *d* In case of the confusion of goods, where those of two persons are so intermixed, that they cannot be distinguished, and separated, there if the intermixture be by consent, the proprietors have an interest in common, in proportion to their shares; but where one wilfully intermixes his property with another's, without his consent, he shall lose it, and the whole shall vest in the other, without being liable to make any compensation. So in the case of accession, if a person should by his labour, or any other way in-

crease,

*b* For the law respecting Fishing, see book III. chap. 22.

*c* Black. Com. 404. *d* Ibid. 405.

create, improve, or add to the property of another, without his consent and approbation, he cannot recover any satisfaction therefor, but if it be done by the direction, or consent of the proprietor, the labourer is entitled to an adequate compensation.

#### CHAPTER TWENTY-FIFTH.

#### OF TITLE TO THINGS PERSONAL BY CONTRACT.

THE title to things personal, may be acquired in three modes, by the act of the party in taking the possession of things in common, which is occupancy, and the original and ultimate foundation of all right : by the agreement or contract between persons for the purchase and sale of property, which is a derivative right : and by the operation of law, as in the cases of title by descent, marriage, and sundry others.

It is evident that individuals in the exercise of the right of occupancy and industry, in the cultivation of the ground, and in manufactures, must acquire a larger stock of those kinds of articles, than are necessary for their own consumption, and a less quantity of others. This was the origin of trade, and mankind by bartering and exchanging those commodities, of which they had a superfluity, for those in which they were deficient, supplied their mutual wants, and furnished each other reciprocal accommodations. But when society had become polished, luxury increased, and a taste for the productions of remote countries introduced, it was found difficult, to supply the multiplied, and artificial wants of mankind by exchange. This made it necessary to agree upon some particular article to be a *common standard*, to ascertain the comparative value of different commodities, and be the general representative of property. The permanent substance of metals, rendered them the most convenient for this purpose. They were therefore adopted as the medium of exchange, and an imaginary value was stamped upon them, by the consent and agreement of all nations. Money being established as the representative of property, facilitated the intercourse of the remotest nations, and the introduction of commerce, distributed every where, the elegant and useful productions of the most

most distant parts of the earth ; and laid the foundation of the unequal division of property, by furnishing to the superior industry and capacity of individuals, those means of accumulating riches, which were unattainable by personal labour in the rude and unpolished ages of society. Gold and silver, instead of being considered as of mere imaginary value, were deemed to be wealth itself, and the riches of a country, were estimated by the quantity of those precious metals which it possessed. The discovery of America, opened to the avarice of mankind the rich mines of Mexico and Peru, and multiplied gold and silver to such an amazing extent, as greatly to lessen their value, and it is probable that the immense quantities that were in circulation, must have made it necessary to have introduced some other medium of commerce, had not the discovery of a passage by the cape of Good Hope, to the East Indies, opened an inexhaustible demand for the gold and silver, that issued from the bowels of South America. The luxury of Europe, and America, has introduced a high relish for the elegant manufactures, and the delicious productions of the East ; but the extreme fertility of this country, has rendered unnecessary the importation of commodities from other countries, for their own consumption, of equal value with their exports, and of course this balance can be discharged only by specie. The despotic governments of India, render the enjoyment of property precarious and insecure, and the proprietors frequently conceal their treasures in the bosom of the earth, for preservation. The knowledge of the place of concealment must frequently be lost, by the sudden or violent death of the possessor, and a variety of circumstances, resulting from the numerous and frequent revolutions of the government. It is an interesting speculation to the philosopher, to observe the numbers of unhappy wretches, that are buried in the mines of South America, incessantly digging for gold and silver, immense quantities of which, after circulating through many different countries, and being the subject of many negotiations, ultimately find the way to the East Indies, and there return again to the bowels of mother earth, never to be called again into circulation, unless by mere fortuitous discovery.

The adoption of money as a medium of exchange, and the introduction

duction of commerce, have in a great measure superseded the original mode of acquisition by occupancy, and have led the way to acquisition by contract. This opens to us a most extensive and important subject of enquiry. Contracts are the basis of all human transactions, and the mode by which property is transferred, and acquired, in the unbounded variety of mercantile negotiations.—The construction of contracts, the compelling of their performance, and the awarding of compensation for their violation, furnish the principal subject on which courts exercise legal, or equitable jurisdiction.

*e* A contract is defined by the Roman law, to be the consent of two or more, to the same thing.

*f* A contract is defined by the common law, to be an agreement upon sufficient consideration, to do, or not to do a particular thing. *g* A contract may be described, to be a transaction in which, each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. In this definition and description, are included every scoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, and promise: for contracts may be considered as the general name, and these are the several species of contracts. By the laws of all nations, the consent of the parties is the essence of the contract. But for the purpose of fully investigating this important branch of our disquisitions, I shall treat of it under the following heads,

1. Of the Parties to Contract.
2. Of the assent to Contracts.
3. Of the subject of Contracts.
4. Of the general nature of Contracts.
5. Of the Consideration of Contracts.
6. Of the Interpretation of Contracts.
7. Of the several species of Contracts.
8. How Contracts may be disannulled, rescinded, or altered.
9. How Contracts may be fulfilled.
10. How Contracts may be released.
11. How Contracts may be barred.

I. Of

*e* Est pactio duorum plerumque in idem placitum consensus.—1 Domat's civil law, 32. *f* 2 Black. Com. 442. *g* 1 Powell on Contracts, 6.



## 1. Of the Parties to Contracts.

All persons have the power of entering into contracts, unless disqualified by certain legal disabilities : but to ascertain what persons have a moral power to bind themselves by their contracts and agreements, we must consider the nature of assent. The term assent signifies the acquiescence of the mind to something proposed, or affirmed, and involves in consideration of law, first a physical power of assenting, secondly, moral power, and thirdly, a deliberate and free use of those powers. Therefore the absence of any of these capacities, in either of the parties, renders the person labouring under it, incapable of entering into an agreement to bind himself, or by virtue of his acts, others.

<sup>b</sup> Idiots and lunatics, labour under a moral incapacity to assent to contracts. They are not governed by reason, but are influenced by an irresistible impulse like machines. All acts that are done by them, are absolutely void : but it seems to be a principle of the common law of England, that no man after the recovery of his senses, shall be admitted to stultify himself, and plead his own disability in avoidance of his contract ; because of the possibility that they may counterfeit such disability : <sup>i</sup> but by the practice of the courts in this state, they have established the doctrine, that a man may stultify himself in his own proper person, and may employ an attorney, and avoid his contract, by pleading his own disability, even at the time while he is labouring under the incapacity.

Drunkenness, may be considered during its operation, as a temporary insanity, yet as it is considered as a crime, and is of the party's own procuring, it will not be a sufficient ground to authorise a person to rescind his assent to the contract. Nor is it a reason for relief in equity, unless the person were drawn into such debauch by the management and contrivance of him who gained the contract, and then equity may relieve. So of a man's being of a weak understanding, is no objection to his assenting to a contract : for courts of law cannot examine into the wisdom and prudence of men, in their manner of transacting their concerns, and disposing of their estates. If a man therefore be legally compos, be he wise

OR

<sup>b</sup> : Powell on Contracts, 11, 14.<sup>i</sup> Moffit vs. Davis, S. C. 1793.

or unwise, he has the absolute disposal of his estate, and will stand for a reason of his actions.

A person that is a lunatic, or non compos at times only, may bind himself by contracts, made during his lucid intervals.

\* Infants are under a legal incapacity, to make contracts to their disadvantage. The rule to decide the validity of their contracts, is whether there be an apparent benefit or semblance of benefit upon the face of the transaction. If neither of these appear, the contract is void : otherwise voidable or not, at the election of the infant, when he arrives at full age. But it is not necessary that such assent should be express, it is sufficient that acts be done, from whence an assent must necessarily be inferred.

† A married woman during her marriage, is incapable of assenting to a contract, to be binding on herself, or her husband, for in consideration of law, she is under the dominion and coercion of her husband and consequently has no moral capacity to assent to a contract respecting his property, or her own. Persons under overseers, are by statute, rendered incapable to make contracts.

## 2. Of the assent to Contracts.

• The assent to a contract, may be either express or tacit.—Express assent, may be manifested by some gesture, speaking, or writing—or in some instances, by acknowledgment before magistrates, and this may be either precedent, concomitant, or subsequent.

A tacit assent may arise in several ways, it may arise from inaction or forbearance of action. A man by his silence, in case he be present and knows what is doing, is presumed to give his assent to what is done, unless it appear that he was awed into silence or in any way hindered from speaking.

• If a man make a lease to another, on good consideration, and afterwards make a lease to a third for the same time, and the first lessee assents in the bargain, and does not discover his lease, and it is not excepted in the second lease, which is upon good consideration, then the second lessee, will even at law be preferred. But to justify

‡ Cro. Car. 503. † Pow. Com. 32. // Ibid. 59. • Ibid. 131.  
• Ibid. 132. 134.

justify the conclusion from a man's silence, that he has relinquished his right: two things are necessary, that he should know what belongs to him, is conveying to another, for where one forbears to act through mere ignorance, it shall not prejudice him, and that he should be voluntarily silent, tho he has full liberty to speak; for if there be any compulsion to hinder his acting, there is no ground from his silence to infer his assent.

### 3. Of the subject of Contracts.

• Under this head we are to consider the subjects respecting which, contracts may be made: and here a distinction is made between contracts, that are executed, and such as are executory. It is a general rule, that a man cannot by a contract executed, grant or convey any thing, in which he has not an actual or potential interest, at the time of the grant or conveyance, because it is necessary to enable a person to transfer property, to be himself the proprietor. Therefore all contracts executed, are void where the person making the conveyance, is not the owner at the time. As if a man should grant all the wool, which he should buy hereafter; this is a void grant, for he has not the wool, neither actually nor potentially.

ρ But where such contracts are executory, operating as declarations precedent, and to the perfection of which, some new act is necessary, to give them life and vigor, the law admits of them, tho made before any interest vested. As if a man covenant with another, to purchase a farm by a certain time, and give him a deed: this covenant would be binding, tho it be purchased after, because there is a new act to be done, the giving the deed. But if there be no new act to be done, it would be otherwise, as if a man should covenant with his son, in consideration of natural love, to stand seized to his use, of the lands which he should afterwards purchase, the use would be void: because here no new act is to be done, and the father did not own the land at the time of the covenant.

γ The subjects of contracts must respect things that are possible to be performed, and therefore all contracts to perform impossible things are void. As a contract to build a large house in a day, to

• Pow. Con. 152. Plowd. 432. Hob. 132. ρ 1 Pow. Con. 158.  
 γ Ibid. 160.

go to Rome in the same time, to drink up the sea, or to touch the sky with one's hand, or any such impossibilities, are all void : and the contracting party would not be subject to an action even for damages accruing by reason of non-performance. But a distinction must be made between things naturally impossible, which must be evident to all the parties at the time of contracting, and things which are not physically impossible, but the impracticability of the accomplishment arises from the circumstances and ability of the party contracting : for in the latter cases, tho the contract cannot be fulfilled by reason of the inability of the contractor, yet he will be liable to pay damages for a non-performance. Thus where a person in consideration of two shillings and six-pence paid in hand, and five pounds to be paid on the performance of the agreement, contracted to deliver to another two grains of rye-corn, on the Monday following, and so on progressively, doubling the quantity on every Monday, during the year ; it was objected on an action of the case brought on this agreement, that it appeared on the face of it to be impossible, the rye to be delivered amounting to such a quantity, as all the rye in the world was not sufficient to produce. But the court determined, that if a man will for a valuable consideration, undertake a thing impossible with respect to his ability, that will not make the contract void ; for though the contract be a foolish one, yet it will hold in law, and the person contracting ought to pay something for his folly.

All contracts to do any acts that are repugnant to law, are void, because where the object of a contract is contrary to a man's duty, it may be presumed that he did not give his full assent, especially if it be to perpetrate a crime, and because the law by forbidding it, takes from the contractor the power of obliging himself to perform it, and consequently prevents the person contracting from gaining a right to require it to be done.

All matters against law are reducible to two heads, that is, things that are bad in themselves, and things that are bad because they are prohibited. Of the first kind are all contracts, that have for their object something forbidden by the moral law, as to commit murder, theft, perjury, and the like ; which contracts acquire no additional turpitude, from being declared unlawful by the legislature.

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gislature.

1 Pow. Con. 161.

2 1 d. Raym. 1164.

3 Fitz. tit. oblig. 13.

gislature. Therefore an obligation to pay a man a certain sum of money, if he will kill or rob another, is void. \* So where the defendant's intestate gave to the plaintiff a bond, the condition of which was, that she should live with him in a state of fornication, and that he should leave her an annuity of sixty pounds a year; the bond was held to be illegal, and void.

w But if a man debauches a woman before chaste, or having seduced a woman before virtuous, gives her a bond as a recompence, or a provision for her support, it is premium pudoris, and good in law.

\* Contracts that have for their object things that are bad, because prohibited, that is not bad in their own nature, as being repugnant to the moral law, but bad because they are against the law of the land, are of three kinds, because they are repugnant to the welfare of the state, or against some maxim or rule of law, or in contradiction to some positive statute.

All contracts are deemed repugnant to the welfare of the state, which have for their object, the restriction of trade in general, manufactures and husbandry. Thus, contracts that a man should not exercise trade, or set up manufactures, or that a farmer should not sow his land, militate against national policy, and are void.—  
y But an agreement upon good consideration, not to exercise a trade in a particular place, will be good; but if it be without consideration, it will be void.

\* A contract for lawful maintenance, or upholding a suit, is against law, and void. An obligation entered into with an alien enemy, has been held to be void, on the ground that such communication with the enemy may endanger the public safety.

\* All marriage brokerage bonds, given for assistance in promoting marriage, are void, because they militate against the general welfare of society.

b All contracts and agreements, the objects of which militate against the principles of morality and public decorum, as is the case with all such as are entered into, to give effect to corrupt

purposes  
\* 3 Burr. 1568. w 3 Wilk. 339. \* 1 Powell Con. 166. y Cro.  
Jac. 596. z 2 Inst. 212. \* 1 Powell 174. b Ibid. 183.

purposes, are void : because they are repugnant to the welfare of the state, and against that rule of law, which prohibits every thing that is contrary to good manners. <sup>e</sup> Therefore if a person who wanted an office, conversing with a person who had most influence to obtain it, should bet a considerable sum with him, that he would not obtain the office, such a wagering contract, tho innocent in itself, if unaccompanied with any sinister view, yet being a mere color to disguise the real intention of the party, namely, to purchase the office, which is an illegal act, the contract would be corrupt and therefore void. Upon the same principle, a wager entered into merely as a color to cover usury, cannot be recovered by an action at law, for the moment that the truth appears, the contract, whatever shape it may assume, will remain to be governed by the same rule, as if the parties had expressly entered into the illicit and corrupt agreement.

<sup>d</sup> If a wager be laid, with one of the judges who are to decide upon a cause, respecting the decision of it, this would operate as a bribe, and nullify the contract. So if a wager be laid with a counsel or attorney on the adverse side, as this would be to induce him to act treacherously in the cause, the contract would be void. <sup>e</sup> But a wager laid between a plaintiff and defendant, in a case whether a decree or judgment of the court be reversed or not, on an appeal, the parties being upon equal terms, and the contract entered into without fraud, was held to be a valid contract, as not being prohibited by positive law, nor against any principle of sound policy, nor against any legal maxim.

<sup>f</sup> All contracts that have any fraudulent object in view, are upon the same ground, void both in law and equity. A contract made with a view to defraud the government, would be void.—  
<sup>g</sup> These principles extend to all contracts of an unfair nature, in respect of their influence on third persons, altho otherwise, as between the parties to them, because if their object be to impose upon third persons, the parties to them cannot have a remedy in law or equity, for they are immoral. Thus if a man attend at auctions, to enhance the price of goods, he cannot support an action at law, to recover a compensation.

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<sup>e</sup> Cowp. 39.  
<sup>g</sup> 1 Powell, 168.<sup>d</sup> 1 Powell, 184.<sup>e</sup> Cowp. 37.<sup>f</sup> Douglass, 450.

*b* All contracts are void that respect things which are prohibited from being the object of contracts by statute, as in the case of usurious contracts for more than lawful interest.

*i* All contracts are unlawful which are intended to induce an omission of something, the doing of which is a duty, in the person with whom it is made. Thus if a sheriff should make an undersheriff, provided he should not serve executions above twenty pounds, without his special warrant, this proviso or agreement is void: for tho a sheriff may do as he pleases in appointing an under sheriff, yet if he does appoint one, he cannot abridge his power.

*j* A contract or agreement, is unlawful that is intended to encourage unlawful acts or omissions. Therefore if the proprietor of a newspaper give the editor a bond of indemnity, against any indictment or action, to which he might thereafter be subjected, by reason of publishing libels or the like, such bond will be void. So a bond to save harmless a sheriff for embezzling a writ, would be void.

*k* Contracts that have a tendency to encourage unlawful acts, are void. As a wager between two people, that one of them, or a third person will beat another, is void, because it is an incitement to a breach of the peace. So if the subject matter of a wager were the violation of chastity, or an immoral action, as if one betted that he could seduce such a woman, such contract would be void, because it is an incitement to immorality.

*l* All contracts, which in their object, wantonly affect the interests of third persons, or their feelings, and thereby disturb the peace of society, will be reprobated in a court of justice. *m* Therefore a wagering contract, that a woman has committed adultery, or that an unmarried woman has had a bastard, will be void. For the law will not permit third persons, for the purpose of laying a wager, wantonly to expose others to ridicule, and libel them under the form of an action. *n* So it has been determined, that no action will lie upon a wager, between indifferent persons, respecting the sex of a certain person, for they shall not be permitted

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*b* 1 Powell, 186. *i* Ibid. 195. *j* Ibid. 196. *k* Ibid. 198. *l* Ibid. 232.  
*m* Comp. 732. *n* Ibid. 729.

to try by a wager, whether he is a cheat or impostor, and call upon his friends and confidential attendants to give evidence, to expose him.

• An action upon a contract that wantonly tends to introduce indecent evidence will not be retained in a court of justice. As if a wager were laid, that a woman had a peculiar defect, in a particular part of her body, or that such person was an hermaphrodite, or had a particular disorder, or as to the cause why a woman did not breed, or the like.

p But here it must be observed, that the contracts and agreements respecting things, which the law prohibits to be the subject of contracts, create no right, and consequently occasion no obligation on the other side, yet the law suffers them in some instances, after they have been carried into execution to stand contrary to its prohibition; for being executed they are valid between the parties, tho the law will not give its aid to either party, to carry them into execution. As for instance, if I game with a man contrary to law, and lose, and pay him the money, I ought not to have recourse to an action, to recover the money, if there be no cheat put upon me by him that has won it.

q But here a material distinction is to be made between the different sorts of contracts, which are prohibited by law. First, such as are founded upon reasons of policy, and public expedience, as where the act is in itself immoral, or a violation of the general laws of public policy. Secondly, such prohibitions as are intended to protect weak, or necessitous men from being over-reached, defrauded, or oppressed—In the former cases both parties are deemed equally guilty, and in the latter only one of them. The law therefore in the former cases, allows no action for the relief of the party who has performed his part, after he has assented with full, and entire liberty, r for it is a general maxim that where the parties are equally criminal, the condition of the possessor is best, and that to him who is consenting there is no injury. Therefore if one pay money fairly lost at play, he cannot recover it back; so if one pay money as a bribe, he cannot recover it in an action, for both parties are equally criminal.

s But where contracts or transactions are prohibited by positive

• 1 Powell, 233. p Ibid. 200, 201. q 2 Burr. 1012. r In pari delicto melior est conditio possidentis—Volenti non fit injuria. s 1 Cowp. 701



tive statute, for the sake of protecting one set of men against another, the one from their condition, and situation being liable to be oppressed, and imposed upon by the other, then the parties are not equally criminal; therefore the person injured after the transaction is finished, may bring his action, and defeat the contract. For instance, by the statute of usury, the taking more than six per cent. being declared illegal, and the contract void, the borrower if he pays the illegal interest, may recover the excess of interest on an action: for this statute was made to protect needy and necessitous persons from the oppression of usurers, and moped men, who are eager to take advantage of the distress of others, whilst they on the other hand, from the pressure of their distress, are ready to come into any terms, and with their eyes open, not only break the law, but complete their own ruin.

■ If the illegal contract remain in an executory state, and be not performed, then if the party who has paid money, as a consideration for something to be done wishes to rescind his contract, he has the power to do it; for so long as nothing is done by either party, each is at liberty to recant, because it is to be presumed, that they have not acted with mature deliberation. As if a merchant has promised another to furnish him with contraband goods, and they agree for a price, either may refuse to stand to his bargain, which they ought not to have made. But then it must be done on the terms of restoring the party to his original situation. So where a sum of money was paid to another, to procure a certain office, and it had not been procured, the party who paid the money recovered it back in an action, because the contract remained executory.

■ If the subject of a contract, or agreement be evidently useless, or tending to no consequence if carried into execution, this will render it void. And the motive to consider it so, is still stronger, if it be of such a nature, as if performed it brings no loss, or prejudice to the party stipulating it, and if fulfilled will create trouble, or damage to the performer; because engagements of this kind produce no obligation: for how can a man have a right of requiring me to put myself to any charge, toil, or trouble in doing

ing a thing, which shall profit him nothing, and it is indeed against reason to undertake an action which can produce no good, and may produce evil. As if a man had agreed not to wash his hands, or comb his head, or change his linen, for a certain time, or to abstain from eating several days, or the like.

• Contracts are void which are made on Sabbath or Lord's day. From sundry adjudications, it appears to be the opinion of the courts, that the transaction of secular business, is unlawful only during the time, from morning light till evening; and that the law does not extend to the solar day. A note executed about noon on the Sabbath day, has been declared void. Notes executed on Saturday evening, and at two o'clock on Sunday morning, have been held good.

#### 4. Of the general nature of Contracts.

• Contracts or agreements, are divided into executed and executory. A contract or agreement is said to be executed, where two or more persons make over their right to another, and thereby change the property, either presently and at once, or at a future time, upon some event that shall give it full effect, without either party trusting to the other; as where things are bought, paid for, and delivered, or where a man has land, under some engagement, and disposes thereof, at the time such engagement ceases. Contracts executed, do not in general retain the name of agreements, but are denominated by some particular term, applicable to their nature. As a sale, grant, lease, assignment, mortgage, and the like.

Executory agreements according to the ordinary acceptance of the term agreement, are such contracts as rest on articles, memorandums, parol promises, or undertakings, and the like, entered into, preparatory and introductory of more solemn, and formal alienations of our property, and free agency. All promises to give, grant and sell, belong to the former class, and all promises or undertakings to do or suffer, belong to the latter class. A contract therefore, is said to be executory, either when one party performs, and the other is trusted, as a loan of money, on a promise

mise to secure it by mortgage of land : or when neither party performs and each trusts to the other, as a promise to take in charge in respect of a premium to be given, or a covenant, to make a lease, in consideration of a sum to be paid for it. Contracts or agreements are applicable to all rights, real, personal or mixed, which may lawfully become the subject of traffic.

All contracts and agreements, whether executory or executed, may be branched into the following divisions. First, contracts are either express, constructive, or implicative. Secondly, contracts are simple and absolute, or conditional. And thirdly, contracts may be written and unwritten.

1. Contracts may be said to be express, where each party stipulates in direct, positive and explicit terms, the thing that is to be done or omitted.

Contracts or agreements are constructive, where the law in expounding the instrument which contains the contract, raises a contract of a different nature, from that, which at first view the instrument imports. As a recital in articles of marriage, that whereas the defendant was to pay to the plaintiff, one thousand pounds for the marriage portion of the wife, the plaintiff covenanted to make a certain settlement : here the recital of the agreement was held good, to support an action of covenant. And the reason of this general rule is, that where persons are agreed on a thing, and words are expressed or written, to make the agreement, altho they are not apt and usual words, or whether they proceed or not, from the proper party, yet if they have substance in them, tending to the effect proposed, and the proper party agrees to them, the law will give them effect by construction, according to the intent and common use of such words. For the law always regards the intention of the parties, and will apply the words to that which in common presumption may be taken to be their intent ; and the agreement of the minds of the parties, is the only thing the law respects in contracts, and therefore, such words as express the intent of the parties, and have substance in them, are sufficient.

Therefore, if a man be bound in an obligation, which is indor-  
ed,

ed, that the obligee wills and grants, that if the obligor stands by the arbitrament, judgment, and order of certain arbitrators, then the obligation is void : it is no ground of objection, that the words are the words of the obligee and not of the obligor, but the condition is good : for there is the substance of a condition, and the intent of the parties appears.

Implicative contracts are such as do not arise from the special agreement of the parties, but arise by the operation of law, out of the circumstances of the case. As where a person receives money to my use, or to deliver it over to me, he is chargeable as a receiver, and the law implies a contract, that he will pay it over to me. So where a man has by any means the custody of the goods of another, the law implies a contract by which he is bound to take care of them, according to the nature of his bailment. If a man deliver stuff, or other wares to another man's wife, knowing her to be married, without the husband's privity or allowance, it is a gift to the wife, and the husband is not chargeable. So the law implies an agreement, that the grantee of one thing, shall have every other thing necessary to the full enjoyment of what is granted.

2. \* Contracts and agreements, are simple and absolute, or conditional.

A contract or agreement, is said to be simple and absolute, where one party obliges himself positively and without condition, to the performance of a certain thing, which the other party may require to be carried into effect. As if a man in consideration of a certain sum of money paid in hand promises to build me a house by a certain day, this is an absolute contract, and I may sustain an action upon it if violated.

A conditional agreement, is where the obligation is in some respect made to depend upon some particular and uncertain event, or at least an event uncertain at the time, in the minds of the contracting parties.

As if a man agree to give another a thousand pounds, if he

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marry

marry his daughter, here the obligation is suspended, till the event stipulated, takes effect, and if it does not happen, disannuls it.

γ Conditions may be said to be lawful and unlawful. α The effect of unlawful conditions vary according to the nature of the contract, and the condition. If a man be bound in a bond upon condition, that he do an unlawful act, the bond is void. But if I deliver a man property, to be his, upon condition that he do an unlawful act, the estate is absolute and the condition void. In both instances, the law aims at the same object, namely, the preventing the crime. In the former case, lest the obligee should have any temptation to commit the crime, the law frees him from the penalty of the bond ; and in the latter case, vests in him the property without performing the condition.

α All conditions repugnant to the nature of the contract, are void. If a man sells another land, upon condition that he shall not alien, or take the profits, the condition is repugnant and void. But a covenant or bond, upon the same condition, will not be void ; because this is not a total restraint of alienation, or taking the profits : and therefore he has the property of the land, tho liable to incur a forfeiture of the covenant, but in the other case, he cannot be said to take the estate.

Lawful conditions may be either possible or impossible.—Possible conditions, are such as accomplish the contracts, that depend on them, as if I agree with the bailee of my property, that on paying me a certain sum, the property shall vest in him, or such as dissolve a bargain, as if a lease be made with a condition to be void, if the lessee under let, become bankrupt, or the like, or such as alter the contract, as if one agree, that if six per cent. (being the interest due on a mortgage) be paid in three months after it became due, the interest shall abate to five per cent.

β Impossible conditions may be divided into such as are so, at the time of making the contract, and such as become so, by subsequent matter : and such impossible conditions have different effects on contracts. For instance, if a condition possible at the time of making thereof, but becoming impossible by the act of God, be annexed

γ 1 Powell, 261. α Co Lit. 206. α Cro Jac. 596. β Co. Lit. 206.  
 1 Powell on contracts 265.

annexed to a contract executed, as the delivery of a horse or the like, the right of such person in the horse shall not be avoided thereby : as if a man deliver another a horse to be his, on condition that the person to whom it is given shall perform some personal service for the giver : yet if he die, so that it become impossible by the act of God, to perform the service, the property of the horse becomes absolute. But if such condition be annexed to an executory contract, as if there be a bond of recognizance or the like, with condition, that the obligor shall appear the next term in such a court, if before such day, the obligor die, the recognizance or obligation is saved. And the reason of this diversity is, because the property in the horse vested by the contract executed, and could not be defeated, unless by some subsequent matter. But the bond or recognizance is a thing in action and executory, whereof no advantage can be taken, until there be a default in the obligor. And therefore in all cases, where the condition of a bond, or recognizance, is possible at the time of making the condition, and before the same can be performed, the condition becomes impossible by the act of God, or the law, the obligation is saved. But if the condition be impossible at the time of making the obligation, the condition is void, and the obligation is single, and stands good. As if the condition should be, that the obligor should go a hundred miles in ten minutes, it is impossible and void, and the obligation binding.

c But a distinction is made upon bonds, recognizances, and executory contracts, where the impossible condition is part of, and incorporated with the bond, recognizance or contract, and where it is indorsed or underwritten, for in the former case, the instrument becomes void, but in the latter case the conditions become void, and the obligation or contract is good.

d We must distinguish between conditions annexed to contracts and agreements, circumstances annexed, which seem to import conditions, that which are modal only, neither disannulling, suspending, or altering the obligations of them, but only respecting the manner of performance : as that an agreement shall be performed on a certain day, or in a certain place. Thus if two

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persons enter into a contract for the sale of an estate, and the conveyances are agreed to be made, and the purchase money paid at such a place and time. The obligation of the agreement, binds the parties, from the moment it is entered into, and the time and place are only circumstances that affect the performance, of the engagement. Such statements do not imply conditions, whereby the parties are to be considered as contracting on the ground of a strict compliance, but are mere circumstances that admit of compensation, and if either party fails to comply, an action will lie against him, for the recovery of damages.

3. Contracts are written or unwritten. Written contracts are rendered necessary in certain cases by the statute of frauds and perjuries—but this subject will be fully investigated in some future part of our enquiries.

#### 5. Of the consideration of Contracts.

\* A consideration is the material cause of a contract or agreement, or that in expectation of which, each party is induced to give his assent, to what is stipulated reciprocally between both parties. It is a general rule, in all cases where the contracts are reduced to writing, they are executed with such solemnity and deliberation, that a sufficient consideration shall always be presumed, and in an action upon a written contract, there shall be no enquiry at law, into the consideration of it, because it is sufficient to say that such was the will of the party contracting. It is clearly agreed at common law, that bonds and all instruments under hand and seal, are conclusive upon the parties, they cannot plead a want of consideration, and no enquiry can be had into the consideration.

f Sir William Blackstone, in his commentaries on the laws of England, lays down the same doctrine, in respect of notes of hand.

g This doctrine is controverted by Mr. Powell, in his essay on contracts. He asserts, that while the note is confined to the parties, who fabricated it, the want of a consideration, is a clear bar against a recovery upon it, on the ground of its being a nude pact, or naked agreement : and that the law prohibits no enquiry into the consideration, till it has been negotiated, and third persons

have

\* 1 Powell, 230.

f 2 Black. Com. 446.

g 1 Powell, 34c.

have become interested in it. But as by our law, promissory notes are deemed specialties, and of as high a nature, as bonds under hand and seal, there can be no doubt, but that the sufficiency of the consideration is as evident in a note of hand, as in a bond : and the party shall not be allowed to deny what he has acknowledged by his own deed. The principle adopted by our law, respecting notes of hand, clearly destroys all distinction between sealed and unsealed contracts : and therefore it may be considered as a necessary consequence, that it is not the sealing, but the writing of the contract that stamps upon it the solemnity, which precludes an enquiry into the consideration. Upon the same principle, therefore, all other written contracts shall be deemed conclusive on the parties, without enquiring into their consideration.

*b* But tho the law admits no enquiry respecting the consideration of contracts, reduced to writing, on the principle, that no consideration is necessary to substantiate such contracts, yet when the actual consideration of a written contract, was against law, by which it was rendered void, the law will admit the party to prove such illegal consideration for the purpose of avoiding the contract.— Thus, if I execute a bond or note, to a person for a consideration, that he commits some crime, the bond is void, and courts of law will so far look into the consideration of bonds, or notes, as to allow the party, to set up such illegal consideration to avoid the note.

So if there be a fraud in obtaining a note, without consideration, it is void. *i* As where a person gave a note with another, as surety for his debt, and the promisee cut off the name of the actual debtor, and then by affirming, that the note was not discharged or paid, obtained a new note of the surety, upon the promise to deliver up to him the first note, and then delivered it to him, with the name of the debtor cut off. For this fraud, the note was considered void, and no recovery was had.

*j* But in all cases of unwritten contracts, it is necessary that a consideration exist : for as words are frequently spoken by men unadvisedly, and without due deliberation, the law will not bind a man to an executory contract, entered into by words only, if it

*b* 1 Black. Rep. 445. *i* Reynolds vs. Bird, S. C. 1791. *j* 2 Powell, Con. 330.



be not founded on good and valuable consideration. Therefore if a man buy of me a horse or other thing, for money, and no money be paid nor earnest given, nor day set for payment, nor the thing delivered, here no action lies for the thing sold, or for the money, but the owner may sell it to another if he will, for such promises or contracts are considered as nude pacts, there being no consideration, or cause for them, and it is a rule of the Roman law, of the common law, and of common sense, *†* that from a nude pact, or naked agreement, no action arises.

*†* I shall consider what considerations are sufficient to support contracts. And first, a consideration may arise from some act to be done by one party, for the benefit of the other; and any thing however trifling to be done by the plaintiff, will be a consideration sufficient to maintain an action: and secondly, a consideration may arise, or be created, by doing or permitting something to be done, to the prejudice or loss of one of the parties. So that it is not absolutely necessary, that the consideration of the contract, imports some gain to him, that makes the contract: but it is sufficient, that the party in whose favour the contract is made, foregoes some advantage or benefit, which he might otherwise have taken or had, or suffers some loss in consequence of placing a confidence in another's undertaking. Thus, if a carpenter promise to repair my house, before a certain day, and he does not do it, in consequence of which, my house falls, I may have an action against him for the damages.

*¶* If a consideration is executed, and does not go along with the contract, but is entirely past, and the contract merely subsequent, it is not a good consideration. As a promise to pay a certain sum, or do a certain thing, in consideration that a person had built a house, or discharged a trespass, is not good, because it appears that the consideration is perfectly past, and no incident thereto, to continue it: so a promise to indemnify a person who had bailed my servant, is void. But where the consideration of a contract is executed, yet if there be an existing duty, it is valid. As if I am indebted to a person for building a house, or for damage done by trespass, or if a person bailed my servant at my request, then the

*†* *Ex nudo pacto non oritur actio.* *1* *1* Powell, 343. *¶* *Ibid.* 376.

existing duty validates the consideration of the contract. So if the consideration arise from a prior moral obligation, as a promise to pay a debt barred by the statute of limitations, or contracted during minority, this is a good consideration, and is not a nude pact.

The law does not require that the quantum of consideration shall be mutually equivalent : but there must be a something, for a something, and any advantage or loss, however trifling, will substantiate a contract at law : but idle, and insignificant considerations, are looked upon, as none at all ; for whenever a person promises without a benefit arising to the promisee, or loss to the promisee, it is considered as a void promise.

„ In executory contracts, if the agreement be that one shall do a certain act, and that the other shall pay him a certain sum of money therefor : here, tho the considerations be mutual, yet one is to be performed before the other, and therefore the act to be done, is considered as a condition precedent, and the party who is to pay, is not liable to an action, till the thing contracted to be performed, is done. • But if a day be appointed for the payment, and the day is to come before the thing can be performed, an action will lie for the money before the thing be done ; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. Where a day certain is appointed for the payment, after the thing is to be performed, the performance is a condition precedent, and must be averred in an action for the money ; for every bargain ought to be performed according to the intent of the parties, and when one relies upon his remedy, it is just that he should be left to it, according to his agreement : but there is no reason that a man should be obliged to trust another, contrary to his intention : and therefore if two men should agree, one that the other should have his horse, the other that he would pay ten pounds for him, no action will lie for the money, till the horse be delivered.

„ But when the considerations are mutual, and the promises separate ; as if another, in consideration that I promise to do a certain thing, promises to do another thing for me, or to pay me money at a certain day ; here I need not alledge that I had performed

formed what I had promised, but I may have an action against him, for his not performing his promise to me, because the consideration, and foundation of his promise to me, was the promise I made to him ; it is promise for promise, and that is the consideration, and not the performance, and each party has a right of action against the other for non-performance. And it is a general rule, that when the defendant has a remedy for the consideration of a promise, that consideration need not be averred to be performed. So if one covenants to marry another's daughter, and he covenants to give him one hundred pounds, either party may bring an action against the other, without averment of a performance on his part. *p* But mutual promises must be both binding, as well on one side, as the other, and both made at the same time, or else they will be naked agreements : but to this rule there is an exception in the case of minors, for these where there are mutual promises, tho the minor be not bound, yet the adult is.

A valuable consideration to support a contract, is work done, money paid, marriage or the like. A good consideration is that of blood or natural affection, between near relations, the satisfaction accruing, from which the law esteems an equivalent for whatever benefit may move from one relation to another. *q* The common law in some cases considers the intrusting a thing with another, and his undertaking respecting it as a consideration in itself, for a faithful discharge of the trust : and therefore tho an action will not lie, for not doing a thing where there is no consideration to uphold a contract, to do it, yet where there is a delivery of goods to a person, who undertakes to carry them, or do something about them gratis, an action will lie on this bailment, if there be a neglect in the management, by which the goods are spoiled. So if I promise another to keep certain goods safely, till such a time, and afterwards refuse to receive them, no action lies : but if I take them, and they are afterwards lost or injured by my negligent keeping, an action lies.

#### 6. Of the interpretation or construction of contracts.

*r* Construction, is the drawing an inference by the aid of reason,

*2* Salk. 21. *q* 1 Powell, 364. *Ld. Raym.* 909. *r* 1 Powell, 370. <sup>as</sup>

as to the intent of an instrument, from given circumstances, upon principles deduced from men's general motives, conduct and actions. The intent of the parties, is to be gathered from the external signs and actions. For no man may put a construction upon his words contrary to the common understanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that sense, which corresponds to the ordinary interpretation of the signs made use of.

In the case of express words, the general rule is, that they must be understood in the most known and proper signification, unless there be the most decisive reasons which lead to conjecture the intent was otherwise. We are not merely to regard the grammatical construction, which relates to the etymology and original of words ; but that which is common and most in use ; for use is the judge, the law, and the rule of speech.

Where words used in a contract expressive of quantity, or the like, have different significations, in different places, they will take effect as they are understood, where they are spoken.—Where words are equivocal, or sentences ambiguous, and capable of several significations, conjectures are necessarily resorted to, for the purpose of discovering the genuine intent of the parties : and in searching for such intent, our conjectures must be guided by the subject of the contract, the effects resulting from it, and the circumstances attending it. But where the obscurity and ambiguity of the terms of a contract, cannot be cleared up by the intentions of the parties, discoverable by the rules of exposition, then the construction ought to be against him, who ought to have explained it himself, or made the other have delivered himself fully. And therefore, he in whose favour the obligation is, ought to speak clearly, or otherwise, the other party has a right to explain the clause to his own advantage. But where the intent of the parties cannot be ascertained by the signs they use, or the contract is inexplicable, or uncertain, it is void.

In all contracts and agreement, the executors of the contracting parties, are implied in themselves, and without naming, if

from the nature of the contract, it appear that the parties so intended.

If money is to be paid by reason of a contract, the terms shall be understood and accepted, according to their import, where it is to be received ; that is, it shall be paid in currency there. So if a man advance money by way of loan, or if another detain his money unlawfully, by reason of which, he becomes entitled to interest, that interest should be according to the value of forbearance, in the country where the transaction arises. If the value of a thing be expressly stipulated in any contract, the value of the thing shall be intended, as things are at the time the contract takes effect. As if rent be, to be paid at a given time, at which time, a shilling is of the value of twelve pence, and it afterwards become only of the value of six-pence, as was frequently the case in former times, if the money be tendered at the time, the lessor shall not afterwards recover any more shillings, than would have paid the rent, at the rate of the money when the rent was due, and tendered. So if one be to pay on such a day, five quarters of corn, and at the day the contract was made, it was valued at fifty pounds, and at the day of payment, five pounds, he would be entitled to five quarters of corn, or five pounds.

This rule has been recognized by the courts of law in this state, and in all instances, upon actions brought upon some contract, for the payment of some collateral article, the rule has been to assess the damages, according to the current value of the article, at the time of payment. The same has been the rule, respecting notes given for any of the public securities of this State or of the United States : to ascertain the value at the time, when payable, and render judgment for that sum. If the contract be made payable on demand, it is considered as due instantly, and the date of the contract has been the period at which to calculate the value of the securities.

Several deeds made at the same time to effect one object, will be construed as one assurance, but so that each shall have its distinct operation, to carry on the main design.

Hitherto

Hitherto, I have been guided in my researches upon contracts, by the essay of Mr. Powell, on that subject, and where it was to my purpose, I have transcribed literally from him, without any attempt to vary his expressions. On mature attention, it is evident that he has fully investigated and exhausted the subject, and has every where expressed himself with that conciseness, perspicuity, and energy, which is to be expected from a writer of first rate genius. As there can be no pretention to originality in a compilation, and as the whole merit consists, in detailing the sentiments of others with fidelity and accuracy, I consider it vain to torture the imagination, to find new expressions to convey the sentiments of that writer, when his style is so perfect and correct, that it would be idle to attempt to improve it.

#### 7. Of the several species of contracts.

We have treated of the general principles respecting contracts, and come now to consider more minutely the several species.—The several kinds of contracts, by which personal estate is transferred, are sale and exchange : bailment : hiring and borrowing : and debt, of each of which, I shall treat at large.

1. *f* Sale and exchange, are the most usual and general mode of transmitting and transferring property from one to another. This may be considered a contract executed, and takes instant effect, by the immediate delivery of the thing. The difference between a sale and an exchange, is this, the delivery of one article of goods for another, is an exchange : and the delivery of goods for money, is a sale : but the same general rules of law, govern each kind of conveyance. A sale of personal estate, is founded on the consideration of some price, that is paid for it, or the value of some article given for it. There must be some consideration to constitute a sale. It is not however requisite, that the consideration be of equal value with the thing purchased : for an actual consideration, however trifling, substantiates the sale between the parties.

It is a general rule, that the owner of things personal may dispose of them whenever he pleases. And let him be ever so deeply involved in debt, or embarrassed with executions, yet a bona fide purchaser

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for valuable consideration, shall hold the estate against creditors. In this respect we differ from the English law, for there when the execution is delivered into the hands of the sheriff, the goods of the debtor are holden to answer the debt, and a sale shall be deemed fraudulent.

An effectual sale and transference of personal property, is made when the parties have agreed on the price, payment is made and a delivery of possession given. No sale can be made without an actual payment or an express agreement for the payment at a future time. If a man asks six pounds for his horse, and another agrees to give him that sum, this is no sale : but if he pay down the money, or the owner agrees to take a note, which is given, or to wait for the payment, till a future day, then the bargain is completed and the property of the horse transferred. Therefore, when the owner fixes on a price, and agrees that he will take that sum, and the purchaser agrees that he will give such price, it is a bargain, and neither party can recede, provided immediate payment or delivery be offered : but if no payment or delivery be offered, and nothing further be done, the bargain is considered of no force and does not bind either. But when the parties have agreed on the price, and any part be paid and received as earnest money, the contract is effectual, and the property is transferred from one and vested in the other, and they have full power to carry the bargain into effect. One may demand the thing sold, and the other the residue of the price.

It is very customary in the sale of personal property, to make an actual, and formal delivery of the thing sold, in the presence of witnesses called for that purpose. This is a prudent practice, and renders such sales evident with the clearest certainty, and proveable with the greatest facility. But such formal delivery of possession is by no means necessary to constitute a conveyance. It may therefore be considered as a general rule, that a sale is effectual, and valid, when the parties have agreed on the price, and the payment is actually made, or an agreement with respect to the payment, be made. If it be manifest that it is the intention of the parties to bargain, that one sells and the other buys, it is sufficient without any formal delivery of the possession of the article. Thus if a man  
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tells me, that the price of his horse is ten pounds, and agrees to take that sum, and I agree to give it, or to give my note payable at a future time, and he consents to take it, here upon my paying the money, or executing the note, the contract is effectually compleated without delivering the horse to me. I may maintain an action against him for the horse. If the horse should die after compleating the bargain, and previously to my taking possession, I must sustain the loss; for as soon as the bargain is made by agreeing on the price and payment, the property is transferred from the seller to the buyer, and the seller becomes entitled to demand the price, and the purchaser to demand the horse. The purchaser however must not take the horse, without offering the price agreed on, and the seller, if he refuses to deliver the horse, when the price is tendered, is liable to an action. But where there is a proposal to bargain, or where there is a mere agreement as to the price, and nothing further is done, the bargain is incomplete, and either party is at liberty to do as he pleases.

On the sale of goods, if earnest money be paid by the purchaser, or part of the goods be taken away, he must pay the residue of the money, upon taking the rest of the goods, because no other time is appointed. The earnest money binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying, or tendering the residue of the money is void. When the seller has taken earnest money, he cannot afterwards dispose of the goods, unless there be some default in the buyer. Therefore if he does not take away the goods, and pay the money, the seller ought to request him to do it: if he then neglects to do it, in a reasonable time, the seller may consider the bargain as dissolved, and dispose of them to whom he pleases, or he may tender the goods to the buyer, and demand of him the residue of the money. The seller must keep the goods a reasonable time for delivery; but where there is no time appointed for the payment of the money, or delivery of the goods, it is generally implied, that the delivery shall be made immediately, and the payment on the delivery.

No person can dispose of personal estate, unless he be the owner, or be thereto authorized by the owner. Thus, if a man  
either



either lawfully or unlawfully gain the possession of my estate, he cannot by any sale divest me of it, without my consent. Thus, if I lend or hire my horse to a man to ride, or trust him in his possession to pasture, he cannot dispose of the horse, nor is he liable to be taken for his debts. If a man steal or tortiously take my horse, he cannot sell him, but I have a right to take him wherever I can find him. If he should pass through sundry hands, I have a right to demand him of the possessor, and if he refuses to deliver him up, I can maintain an action against him, and so I may against any of the persons through whose hands he has passed, however honest they may be : and the person of whom I recover, if an honest purchaser, must look to him of whom he purchased for his recompence ; for the law will not suffer any man's property to be transferred without his consent. The purchaser therefore, must take care, that the person of whom he buys, be the lawful owner, for if he be not, he must risque the consequence. Therefore, if I lend the use of my property to a poor neighbor, for an honest purpose, I am secured by law against his selling it. But if a person will trust his property in the hands of a bankrupt, for the purpose of enabling him to cheat and defraud, he shall be concluded by the act of the bankrupt. If the owner be present, and sees another dispose of his estate, without informing the buyer, such silence shall be construed to be a tacit acquiescence in the sale. But if he be not present or knowing to such sale, he is not bound by it. In all cases, it is prudent and reasonable for the owner of the property, if he is acquainted with the transaction, to forbid it and make known his claim ; especially where an officer levies an execution upon the estate of one man, as belonging to another, so as to prevent any presumption or implication of consent. If a man suffer another to have the custody of his property, as a horse for example, and permit him to make sale, and the purchaser for some time has him publicly, without any claim from the original owner, this shall be deemed an assent to the bargain, and he shall be precluded from making any demand of the horse from the purchaser. In England the sale of things in fairs, and markets overt, bind the owner, but here the law is otherwise.

*z* All sales of personal as well as real estate, made with an intent to defraud creditors, are void as to them, by the common law, as well as by statute. *u* It has been determined, that where a man in failing circumstances, makes over his property to one of his creditors, to pay his debts and return the surplus, it is putting his estate out of the reach of legal process and taking it out of the management of the law, and is a fraud.

*w* A fraudulent conveyance or gift, to deceive or defraud one creditor is void against all : but fraudulent conveyances, can never be construed, to be fraudulent, only with respect to real creditors, and purchasers for a valuable consideration, but shall bind the parties and their representatives.

As fraudulent sales are usually conducted in such a manner, as to render it difficult to obtain express and direct proof, courts have been obliged to admit certain presumptions, to detect such dishonest transactions.

*x* The characters or badges of fraud in sales and conveyances, are, 1. Where the conveyance is general comprehending all a man's estate, without exception, which cannot be presumed to take place, without a good understanding, that the feller shall have some part of his support. 2. Where the feller remains in possession, for this is the best evidence of property. 3. Where there was a secret manner of transacting the sale, with unusual clauses in the conveyance, as that it was made honestly and truly, which artful appearances are marks of collusion and fraud. 4. Where there is a secret trust between the parties, to permit the feller to use or have some advantage of the goods.

2. Of bailment. *y* This is defined to be a delivery of goods upon trust, to another person, to keep for certain purposes ; being sometimes for the use of the bailor, sometimes for the use of the bailee, and sometimes for a third person. Bailment is in all cases, where goods are to be delivered into the hands of another, without transferring the property, and the law always implies a contract, that the bailee will take care of them according to the nature of the bailment. There are six kinds of bailment, which I shall consider

*z* 3 Co. 83. Co. Lit. 290. Statutes 87. *u* Franklin, vs. Larrabee, 5 C. 1793. *w* 5 Co. 60. Cro. Jac. 270. *x* 3 Co. 81. Moor, 638. *y* 2 Black Com. 451.

consider separately, for the purpose of understanding the subject clearly, first remarking, that the law respecting bailments is principally derived from the Roman jurisprudence.

1. A bare naked bailment of goods, is where they are delivered by one man to another to keep for the use of the bailor. In this case, the law implies a contract by the bailee, that he will take such care of them, as that they may not be damaged by any gross neglect of his own. For in such cases it seems to be contrary to reason and justice, that where a man is to have no reward, he should be charged without some default in him. He is not therefore bound to do every thing he is capable of, but if he keeps the goods with an ordinary care, he performs his trust. And even if he keeps the goods bailed to him, as he keeps his own, it is evidence that he has discharged his undertaking : and therefore in such cases, if he keeps his own negligently, yet if he keeps the other in the same manner, he is not chargeable. As if the bailee be known, as an idle, drunken, careless fellow, and come home drunk and leave open all his doors, by which the goods are stolen, yet he shall not be charged, because it was the bailor's own folly, to trust such person.

2. The second kind of bailment, is where useful goods are lent to a friend, to be used gratis, and be restored in specie. In this case the law implies, that the borrower contracts to use the strictest care and diligence to keep the goods, so as to restore them back again safe to the lender, because the bailee has a benefit by the use of them, and if he be guilty of the least neglect, he will be answerable. As if a man lend another his horse to go westward, or for a month, and he goes northward, or keeps the horse more than a month, he is liable for any accident that befalls him, on the northern journey, or after the expiration of a month ; for he has made use of the horse contrary to the trust, and it may be, if the horse had been used no otherwise, than he was lent, the accident would not have befallen him. But the bailee is never answerable for any accident that befalls things bailed to him, while he is using it according to the bailment, and is guilty of no neglect. Therefore if a horse bailed as aforesaid, should be stolen from the stable of the

1 Lord Raymond, 913. 2 Ibid.

the bailee, where he was properly secured, he would not be liable ; but if the stable doors be left open, he shall be answerable for the neglect. For he ought to take the utmost care, but in no case shall he be charged where there is no default in him.

3 *b* The third kind of bailment is where goods are delivered to the bailee, to be used by him for hire, and restored in specie. He is bound to take the utmost care and return the goods at the expiration of the time for which they were hired : but shall not be charged without being guilty of some neglect. Much of the intercourse among mankind is carried on in this way, and the hirer must pay such price as is stipulated, or what it is reasonably worth, if no express stipulation be made.

4 *c* The fourth kind of bailment is where goods are delivered as a pawn, to be security for money borrowed. The creditor who takes the pawn is bound to restore it on payment of the debt, and if he uses due diligence, and reasonable care in keeping them, he will be indemnified against any loss ; and if they are lost without his neglect he may resort to the pawner for his debt. If the pawn broker be at charge in keeping the goods, as if it be a horse, and he provides hay for it, he may use it for his reasonable charge. But if the money be tendered, before the goods are lost, the pawnee shall be answerable for them, because by detaining them after tendry of the money, he is a wrong doer, and must in all events be answerable for the loss.

5 *d* The fifth kind of bailment is where goods are delivered to be carried, or some thing to be done with them, by the bailee for a reward, to be paid by the bailor. If they are delivered to a common carrier, and he is to have a reward, the law implies a contract to answer for the goods, at all events, excepting the acts of God, or the enemy of the state : for otherwise carriers who are trusted with things of great value, would be under a temptation to confederate with thieves. But if they are delivered to a private person, tho he has a reward, yet he is only to do the best he can, and while he is guilty of no neglect, he is responsible for no accident, or misfortune.

6. The sixth sort of bailment, is the delivery of goods to a person, who is to carry them or do something about them gratis, and without receiving any reward for such work or carrying. This is an action by commission, and if the bailee behaves negligently he is answerable, but the contract must depend upon the nature of the engagement, whether it be general or special. A general undertaking only implies a contract against gross neglects; and therefore if one undertake to carry brandy for another, and mischief be done by some person meeting the cart, or if a drunken man come by in the street, and pierce the cask, the bailee is not liable and for this reason because he is to have nothing for his pains: but if the accident happen by his neglect he is answerable. But if a man undertake expressly to do such an act safely, and securely, if the thing come to any damage by his miscarriage, the law implies a contract, that he will be answerable; for this reason, that he undertakes the task, and is intrusted on these terms.

In all these instances a special qualified property is transferred by the bailor to the bailee, together with the possession. The bailor therefore is considered as having the general property; because he has a contract for its restitution, and the special property is in the bailee. Either can maintain an action for any injury done to such property, while in possession of the bailee. The bailor because he has the ultimate property, and the bailee because he is responsible to the bailor. But a recovery by one will bar the action of the other. The bailee has no power to transfer the property entrusted to him, without the consent of the bailor.

3. Of hiring and borrowing: and here I speak only of that kind of hiring, and borrowing, by which the property of the thing is transferred, and the hirer, or borrower is not bound to return the same thing hired, or borrowed, but another of the same nature. Where the identical thing must be restored, I have considered under the head of bailment. All the difference between hiring, and borrowing is, that in the first, restoration must be made of a similar thing, to that which is borrowed, with compensation for the use,  
and

and in the last, the restoration is without compensation : but in both instances the property is transferred from the person that lends or lets, to the borrower or hirer.

In all instances of hiring, where a specific restitution is to be made, the law leaves it to the party hiring, to stipulate for such reward, for the use of the thing as he pleases. It is left to the freedom of mankind to contract respecting the sum, to be paid for the use of a horse, oxen, and any article of husbandry, as much as it is, to fix upon a price to be given for horses, oxen, or the like. But when we take into consideration money, or any articles whatever, loaned by one person to another, to be repaid in money, or articles of like kind, by which a debt is contracted, the law has limited the premium to be allowed for the use. Therefore when I let or loan to a person money, wheat, or any article, or commodity whatever, to be repaid at a future time, I must confine myself within the limits of the law, respecting the compensation I am to receive. So in all instances where a man is indebted to me, and it is agreed to delay the payment, and he agrees to allow me a recompense for the delay, I cannot exceed the interest limited by law.

The loaning of money for interest, is now become so universal, and common a practice, that we can hardly suppose that there ever was a period when it was deemed repugnant to morality, or religion. Yet from a rule in the law of Moses inhibiting the Jews from lending on usury, or for interest to their own nation, tho it expressly permitted it to be done to a stranger, and from an opinion of Aristotle that money was barren, and that therefore interest for it was contrary to the nature of it, we find that the Roman cannonists prohibited the taking of interest. But this is not the only instance in which the church of Rome, interdicted as sins, the most innocent transactions, while they indulged for a trifling reward, the most enormous crimes. The consequence of this impolitic restriction, was to throw the business of lending on interest, into the hands of the Jews, who did not pay a conscientious regard to the cannon law : and the danger to which they were exposed, obliged them to resort to the

real practice of usury for their indemnification. So that the regulation which was intended to prevent usury, gave birth to those practices which are really detrimental to the community, and deterred mankind from loaning money at that moderate rate of interest, which is consistent with the public welfare. The taking of interest was allowed by the Roman law, which as far as it respects property, is founded on the clearest reason and justice.

The statute law of this state, has established the rate of interest in all cases at six per cent. for a year. In the computation of interest on a debt, interest upon interest is never allowed.—Where sundry payments have been made upon a debt carrying interest, the courts of law have established the following rule. Compute the interest to the time of the first payment, if that be one year or more, from the time the interest commenced, add it to the principal, and deduct the payment from the sum total. If there be after payments made, compute the interest on the balance due, to the next payment, and then deduct the payment as above, and in like manner, from one payment to another till all the payments are absorbed, provided the time between one payment and another, be one year or more: but if any payment be made before one year's interest has accrued, then compute the interest on the principal sum due on the obligation, for one year, add it to the principal, and compute the interest on the sum paid from the time it was paid up to the end of the year, add it to the sum paid, and deduct that sum from the principal and interest, added as above. If any payments be made of a less sum than the interest arisen at the time of such payment, no interest is to be computed, but only on the principal sum for any period.

This rule was adopted, and established in the year 1784. Previously to that time, the following mode of computation had been in practice in some parts of the state. To compute the interest from the time it commenced to the time proposed, and add it to the principal sum, compute the interest on each payment from the time they were made, till the time proposed, add each payment and interest together, and deduct from the debt. By this last mode, it is apparent that every payment applies directly upon the principal sum of the debt, and none to the interest, till after the principal

pal is discharged—and the consequence is, that if a man loan another a sum of money and receive and indorse the amount of the interest annually, if this mode of computing interest be adopted, the whole debt comprehending principal and interest, would be discharged in twenty five years. But by the mode now in force, this injustice is remedied by the application of payments in the first instance to the interest, and not to the principal, unless they surmount the interest : and as no interest is ever to be cast upon interest, it steers clear of compound interest, which the law will not permit. This mode would be unexceptionable, were it not, that in computing interest on obligations, on which many payments have been made, and on obligations on which no payments have been made, a very different and unequal measure of justice is meted out to the respective debtors. For where no payments have been made, simple interest only is computed : where many payments have been made, compound interest comparatively speaking, is computed, and the consequence is, that two debts of equal magnitude, let them be on interest for a number of years, let one make frequent payments and the other none, and compute the interest by this rule to a certain time, and we shall find, that the person who has made the payments, must eventually have a considerable larger sum to pay, taking in all his payments, during the period proposed, than he who has not made any payment. The debtor who makes the greatest efforts to be punctual, pays compound interest, and the most negligent debtor goes clear with simple interest.

The old mode of calculating interest is so manifestly unjust, that no person can wish to see it restored. The inequality of the present mode is so great, as to require to be remedied. Any mode which at a given rate per cent. shall operate equally in all cases, must be acknowledged to be just and right. Compound interest is the only possible mode that can be adopted, that will have this operation. By that rule, we shall find that no difference will eventually be made between them, who make frequent payments on their obligations and those who make none : and by the same rule, all payments will first be applied to the interest. No reasonable objection can be made against compound interest. At the end of a year,  
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it is manifest that the interest is as much due to the creditor, as the principal. If payment be delayed, interest ought to be computed upon the one as much as upon the other. As this is the only fair, just, and equal mode of computing interest, I presume that the period is not distant, when mankind will cease to be frightened by words, and compound interest be established by law.

Our courts formerly adopted very narrow principles with respect to the allowance of interest on debts, rarely allowing it, unless there was an express contract to pay it. I have known them refuse to allow it on protested orders ; in actions for money had and received : and in actions of debt on judgment : but of late, more liberal and equitable principles have been adopted. They have allowed interest on actions for money had and received. *f* And in one case upon a note without interest, after the day of payment had elapsed. The just rules of allowing interest are very plain. It ought to be computed on all debts where there is an express or implied contract to pay it, and in all cases, where in justice and good conscience it ought to be paid, or where there has been an unreasonable delay of payment of the principal debt, it ought to be allowed by way of damages.

The principle by which the rate of interest on money loaned, is determined, depends on a calculation of the quantity in circulation, and the goodness of the security. If money be exceeding plenty, interest will be low in proportion. This has been exemplified in Europe since the discovery of America. The immense quantities of gold and silver imported into Europe, encreased the price of things, and lowered the rate of interest. If the security for the money be undoubted, and there be no hazard of loss, the interest ought to be proportionably low : such are the general principles that will govern mankind respecting the rate of interest ; but the legislature cannot make such nice discriminations, but must establish one general rule, extending to all cases of loans. However, where from the very nature and terms of the contract, the principal sum is put in hazard, it is not considered as governable by the general law, but the parties are admitted to make such contracts as they please, respecting the premium, where the premium and principal

*f* *Eldekin vs Dyer*, Supreme Court of Errors. 1795.

principal are both at risque. Such are the cases of bottomry, respondentia, and policies of insurance.

1. *g* Bottomry, is in the nature of a mortgage of a ship, where the owner hires money, and pledges the keel or bottom of the ship, for the repayment. If the ship returns, the premium agreed on must be paid, and the ship and borrower are both answerable; if it be lost, then the lender loses his money. But if the loan be not on the ship, but on the goods or merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower is bound to answer the contract, who is therefore said to take up the money at respondentia.

2. *h* Policies of insurance, are contracts made by persons in this manner. If a person has a vessel at sea, or that is about performing a voyage, it is usual for him to apply to some person, who is called an insurer, who for a certain premium, will insure against all losses. If the vessel return safe, then the insurer gains the premium. If it be lost, then he must pay the sum that was insured. The rule to calculate the premium is, to proportion it to the hazard and danger of the voyage. This practice is much favoured by law, as it tends to distribute the losses in trade among the commercial interest in general, and saves individuals from total ruin by a single loss.

4. *i* Debts are things in action, and may be defined to be the right which one person has to call upon another, for a certain sum of money; and the duty or obligation of the person to pay the sum. Debts may be considered as resulting from contracts express or implied: as when one person delivers to another property, or performs for him certain services, this creates an indebtedness from one to the other, and there is a contract express or implied, to pay what the property or service was reasonably worth. Debts are of two kinds, those which are evidenced by written contracts, and those which depend on parol proof.—Debts which are supported by written evidence, are of two kinds; those which are of record, and those which are subscribed by the party obligated.

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*g* 2 Black. Com. 457.

*h* Ibid. 458

*i* Ibid. 464.

1. A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus a sum found due from one person to another on an action, by the judgment of a court, is a debt of record, which is the highest evidence of a debt.

Recognizances acknowledged by parties in court, are debts of record. These are entered into for various purposes. In criminal prosecutions for bailable offences, the person may procure bail, who enter into recognizances in presence of the court. So persons may acknowledge bonds of recognizance for their good behaviour. These recognizances are all upon certain conditions, that the criminal appear, abide final judgment, or be of peaceable and good behaviour; and if the conditions are fulfilled, the recognizance is void, but on failure it becomes forfeited. In civil actions, bonds of recognizance may be required in certain cases, from one party to the other. In all cases where the plaintiff lives out of the state, where the suit is by attachment, or the plaintiff is so poor, that he is unable to pay a bill of cost, bonds for prosecution must be given. So where the body of the defendant is attached, he must give bail to abide final judgment, and in cases of appeal, bond must be given to prosecute such appeal. These bonds are all expressed to be on certain conditions, which if performed, they are discharged, if forfeited, the damages are recoverable by them.

2 Debts evidenced by written contracts, are further divided into those which are signed and sealed, as bonds, and those which are unsealed, as promissory notes, and bills of exchange. They are further divided into debts by due specialty, and debts due by simple contract.

In England, debts by specialty, are where the security is under hand and seal, and debts by simple contract, are where the contracts are in writing unsealed or parol. But in this state, the courts have adjudged, that promissory notes tho unsealed, are specialties. Our law then is, that specialties consist of obligations under hand and seal, and of promissory notes: and the simple contract comprehends all other contracts, written and parol. The distinction however between specialties and simple contracts, is not of any great importance in this state, because there is no preference given

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to creditors in such cases, but they all stand on the same footing. I proceed to treat of bonds, promissory notes, and bills of exchange, which are the usual written contracts, that are used between individuals, in the ordinary negotiation of business.

1. A bond or obligation, is an instrument, or deed written on paper or parchment, by which the obligor, obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another, at a day appointed. If this be all, the bond is called a simple one : but the general practice is to add a condition, that if the obligor does some particular act, the obligation shall be void, or else to remain in full force : as payment of rent, indemnity on any account, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest ; which principal sum, is usually half the penal sum specified in the bond. In case the condition is not performed, the bond becomes forfeited, and at common law the obligor is liable to pay the whole penal sum ; but as this is usually much larger, than what the obligee ought in justice to take, our statute law has enabled courts of law to take up such matters in equity, and to render judgment for such sum as is due in justice and good conscience.

2. Promissory notes, contain express promises for value received, to pay by a certain time, a certain sum of money, or some collateral thing. Wherever there is a debt certain to be secured, it has become the usual practice to secure it by note, as the security is of a more simple, tho' of as high a nature as bonds : and bonds are now rarely used, unless it be in contracts where it is necessary to provide for the performance of certain conditions.

3. Bills of exchange, are a written security, calculated for the convenience of commercial transactions, and may be defined to be an order, direction, or request, from one person in favour of another, to a third person, desiring him to pay a certain sum on his account. The person who writes the request, is called the drawer, the person to whom it is directed, is called the drawee, and the person to whom it is made payable, is called the payee.

Bills of exchange, are foreign or inland : foreign bills are drawn

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by merchants residing abroad, upon their correspondents or ~~con-~~ nexions at home, or by merchants at home, upon their correspondents or connexions abroad. A bill of exchange, is deemed a thing in action, for the law implies a promise on the part of the drawer, that if the drawee refuses to accept and pay the bill, that he will pay it himself; and therefore it is the common practice, to express that a value has been received by the drawer. The drawer not being liable if the drawee pays, it is necessary for the payee to make application to the drawee, to present him the bill, and request him to accept and pay it. If the drawee refuses to accept, or accepts and neglects payment, for the term of three days, the payee must go before some notary public and procure it to be protested, for non-acceptance or non-payment, as the case may be, and within fourteen days give notice to the drawer. If there be no such notary public in the place, then the protest may be made by some substantial inhabitant, in the presence of two credible witnesses, and then the drawer is liable to pay the bill, with all the costs and damages. The payee must apply in due time to the drawee, and proceed and notify regularly, if he means to subject the drawer, and if he is guilty of any neglect or delay, by which the debt is lost, he shall sustain the loss.

Inland bills of exchange, are drawn by persons within the state on each other. They are here known by the name of orders, and are become a very common and convenient mode of negotiation. They are dependent on the same general principles, as foreign bills: but as they differ in some respects, I shall treat of them particularly. Orders are to be drawn in precisely the same form as bills of exchange, and it is usual to express a value received, which precludes any dispute respecting the consideration; but if a value received, be not expressed, it must be averred and proved in an action grounded on the order. The payee or bearer must in a reasonable and convenient time apply to the drawee, present the order and request him to accept, and pay the same. If the drawee refuse to accept, or if he accept and refuse to pay immediately, or if the payee be willing to wait a reasonable time, and he does not make payment, then the payee must give notice within a reasonable time to the drawer, of the non-acceptance, or non-payment

non-payment of the order, and then the drawer becomes liable to pay the same to the payee. For in all cases the law implies a contract, that the drawer will pay the order to the payee in case of the refusal or inability of the drawee. But to render the drawer, liable to pay the order on account of the inability of the drawee to pay, it behoves the payee to apply as soon as convenient and reasonable in the course of business, to the drawee, to present to him the order for acceptance and payment : for in case of a failure, and bankruptcy of the drawee, after the drawing of the order, the drawer is not liable to pay the order, unless the payee has used due diligence, in his attempt to obtain it of the drawee ; and on failure, has given reasonable notice to the drawer. Therefore if the payee neglects unreasonably to present the order, or delays giving notice of non-acceptance, or non-payment in a reasonable time to the drawer, so that it appears, if the order had been presented in due season to the drawee, that he would have paid it, or if reasonable notice had been given to the drawer, that he might have called upon the drawee for the debt, then the drawer shall not be liable to pay the order to the payee ; because the debt is lost by the neglect of the payee. A mere acceptance of the order by the drawee will not exonerate the drawer ; but if the payment be not made in a reasonable time, and due notice be given, the drawer is liable, but if the payee receives any part of the money on the order, or takes the security of the drawee for it, he wholly acquits and discharges the drawer. There is no need of a protest of the order by our law, to make the drawer liable. The refusal to accept, or neglect of payment, is sufficient to charge him, and no formal protest is ever made. As the law in discharging the drawer from any liability to pay the order to the payee, goes on the principle that there has been a failure of the drawee, and the drawer must lose his demand on the drawee which is owing to the neglect of the payee, it follows of course, that where there has been no failure of the drawee, if the payee delays presentment of the order, or notice of non-acceptance, he shall not be foreclosed of his demand upon the drawer ; because no inconvenience accrues from such delay to the drawer, for the same demand continues against the drawee, as well

as the same ability to pay. But whenever any prejudice can arise to the drawer by reason of the delay, he shall be exonerated from any liability, as if the demand be on the drawee by book, and the payee neglect presenting the order, or giving notice of the refusal till the drawer be barred by the statute of limitations, he cannot be liable. So that the drawer can never be liable where there has been a delay on the part of the payee, unless his demand, and the ability of the drawee be such, that the drawer may recover his debt.

In addition to these particular securities, there are many other written securities, which are things in action, and depend upon the general rules and principles of contracts. There are also an unbounded variety of verbal contracts express and implied; as well as book debts, which are governable by the general principles, which cannot be here considered, but will be taken up in the next book and treated of with all the minuteness that is necessary.

I shall now proceed to make some observations, which are equally applicable to all written contracts.

1. \* All obligations or written contracts are good tho they want a date, or have a false or impossible date, for the date is not the substance of them. The day of the delivery of an obligation is the date, when there is no day set forth: but if it be dated one day, and was delivered another, it is considered as bearing date on the day of the delivery. † If the plaintiff declare on a bond, or any written contract, bearing date a certain day, and does not say when it was delivered, this is good; for every deed shall be presumed to be made, and delivered on the day it bears date, but when he has once declared on a day, he is afterwards stopped from saying that it was first delivered on a different, because this would be a departure. ‡ The plaintiff may declare on a bond, or other written contract, bearing date a certain day, and aver that it was first delivered on the day, when it in fact was delivered. Where the obligee declares generally on a bond of a certain date, the obligor may plead that it was first delivered on a different day,

but

\* 2 Co. 5. 3 Bac. Abr. 694. † Cro. Eliz. 773. ‡ Lev. 196.

but he must traverse the delivery on the day of the date. <sup>a</sup> If the bond was delivered before the date, on issue of *non est factum* joined thereon, the jury are not estopped to find the truth, that it was delivered before the date, and it is good from the delivery.

There are no particular formalities required by law, respecting the delivery of written contracts; but where they pass from one to the other by mutual consent, and pursuant to their intentions, they will be obligatory.

2. <sup>a</sup> It is an established principle, that two or more persons may be bound jointly, in any written obligation, or they may bind themselves jointly and severally. In case of a joint obligation, the obligee must sue all the obligors, but when he has obtained execution, he may collect the money of which he pleases, and the rest shall be accountable for their proportion to the person who paid. Where one of the joint obligors, die, his executor or administrator is wholly discharged of the debt at law, and it survives against the survivors: but in equity, if the surviving obligor be unable to pay, and the deceased obligor left a sufficient estate, then such estate shall be answerable. Where there are several persons who are bound jointly and severally in any written contract, the obligee may at his election, sue them all jointly, or any one of them, or he may at the same time, bring forward separate actions on the bond or security against each of them, and pursue them to judgment and execution. <sup>p</sup> But where there are more than two obligors, he cannot join two in the suit, he must join all, or sue them all separately, unless it appear that the other persons are dead.

<sup>q</sup> If there are several obligors, it continues to survive as the obligors die, till it wholly operates against the last obligor living, and then on his death, his executors, and administrators are only liable at law, and the right does not accrue at law against the executors and administrators of the others, tho it does in equity.

<sup>r</sup> If there are several obligors bound jointly and severally, the obligee may sue them all jointly or severally, but if he sues them jointly, he cannot sue them severally, for the pendency of one suit will abate the other. He may then collect the money of which

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<sup>a</sup> 2 Co. 4—6. <sup>a</sup> 2 Rol. Abr. 148. <sup>3</sup> Bac. Abr. 697. <sup>p</sup> Sid. 238. Cro. Jac. 152. <sup>q</sup> Bundy vs. Williams, S. C. 1793. <sup>r</sup> 3 P. Will. 405.



he pleases, but he can never make but one collection of the money, which operates as a discharge of the whole debt, and all the executions. / In case of joint and several obligations, if one of the obligors die, action will lie against his executor or administrator, and they are not discharged at law, as in the case of joint contracts.

\* There may be several obligees or promisees, but a person cannot be bound to pay to two severally, but such obligation is void, where a bond is to pay to two persons, or either of them, the several part is void, and the bond is joint. If an obligation be to three, to pay money to one of them, they must all join in the suit, for they are but as one obligee, and if he to whom the money is to be paid, dies, the other must sue, tho they have no interest in the sum contained in the condition.

\* In some cases, one person has the power to bind another by contract, as in all cases where a special authority is given for that purpose; and in all companies and copartnership, for the carrying on of commerce, according to the custom of merchants and from the nature of the connexion, each one has an implied power to contract for, and bind the whole, in the ordinary course of business: and a note given for a company debt, by one joint-merchant in the name of himself and partner, or by the name and firm of the company, is good against all.

3. \* It is a general rule of law, that things in action are not assignable: and as we have no statute on the subject, the consequence is, that written contracts cannot be assigned at law, so as to enable the assignee to bring an action in his own name, for the recovery of the debt. The assignee however acquires such a property in the paper that contains the contract, that he may keep it, may receive the money due upon it, and may destroy it, and is not accountable for it to the assignor. But tho bonds, notes, and other written contracts, cannot be assigned at law, and tho the obligee is ever considered as the legal proprietor of the security, yet in equity, obligations are assignable for a valuable consideration, and the assignee alone has a right to receive the money, and if the obligor after notice of the assignment, pay it over to the obligee, he is compellable in equity, to pay it over again to the assignee. The assignee

/ 2 P. Will. 313.    t 3 Bac. Abr. 696.    u Kirb. 148.    w 1 Bac. Abr. 157.

assignee however, must take all obligations, subject to the same equity, and under the same conditions, that it was in the hands of the obligee. The law respecting assignments will be fully considered in the next book of our enquires.

8. We are to consider how Contracts are to be disannulled, rescinded or altered.

\* All contracts before they are executed may be rescinded, rescinded from, or waved by the concurrence of all parties, and in some cases, one of the parties may rescind the contract, as in sales with liberty of refusal. But where the time in which a contract is stipulated to be performed, is past, there is a perfection given it, by an action on one side, that renders it indissoluble, and it cannot be annulled; but it may be released or discharged, for there is a difference between the dissolution and release of a contract.

γ A release may either be express or tacit. An express release is where there is a regular acquittance or discharge from the contract. A tacit release, is where the person who claims a benefit by the contract, cancels it, or destroys the instrument, by which it can be proved. A release, may be parol, as where the parties made a contract for the sale of lands, and a deed was given, and a note for the payment, but before the deed was recorded, they concluded to rescind the bargain, the deed was given up, but the person not having the note with him, agreed to and did discharge the promisor: on an action on the note, this was adjudged a good discharge.

• It is a general rule of law founded in reason, that if the person who derives a benefit from the fulfilment of a contract, is the occasion why it is not carried into execution, such contract is thereby annulled, and the contracting party excused from any obligation to perform it. If a man covenant within a certain term, to build a house upon the land of another, and the owner of the land forcibly prevent him from entering on the land, or prohibit him from doing it, he is discharged from the covenant. So if a man be bound to appear on a certain day, and before the day, the obligee cast him into prison, the bond is void. In such cases, the party

\* 1 Powell, 412. γ Ibid. 416. z Currie vs. Beardley S. C. 1792.  
• 8 Rep. 92. Co Lit. 206.

ty bound to a performance will be in the same condition as if the agreement had been fulfilled by him, for if he whom it concerns to have my part of the covenant fulfilled, is the occasion why it is not, it is the same thing to me as if it were fulfilled.

*b* A contract of a lower degree is discharged by accepting a contract of a higher degree for the same thing, as taking a bond for a book debt, but by the common law, contracts of equal degree, do not extinguish or determine each other. It is therefore said, that the acceptance of one bond for another, does not discharge the first bond, and that a new bond does not discharge a judgment, but a recovery on the first bond will bar an action on the second.

*c* Where the right and the obligation meet in the same person, the contract generally is thereby dissolved, for since a man cannot be his own creditor and debtor, it follows, that if a man becomes representative to his debtor, his action ceases, there being no object on whom it can attach. Therefore, if the creditor makes his debtor his executor, the debt as between them is extinguished. *d* So if a man owe a debt to a single woman, and marries her, the contract is dissolved by act of law, by the union of the right and the obligation in him. But here a distinction is made between contracts that are to be performed during marriage, or after the death of the husband; for if the action can accrue during marriage, it is released by the marriage; but if it cannot rise during the marriage, and is not to be performed till the death of him who made the promise, then it is binding. As if a man before marriage, promise his intended wife, to leave her worth a thousand pound, as this contract is not to be performed during the marriage, so that an action can accrue to the wife in that time, it is not released by the marriage.

*e* A man may be discharged from his contract by the act of God; for when a thing is prescribed to be done, or omitted, if by the act of God, it become impossible, the person obliged shall not receive any prejudice, for not executing what is stipulated, if every thing be performed without neglect, that the parties might perform

*b* 1 Powell, 423. *c* Ibid. 438. *d* Ibid. 441, 442. *e* 10 Mod. 268.  
1 Rep. 98.

**perform** : because it would be unreasonable that those things which are inevitable, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person, in whom there is no neglect. As if a lessee covenant to leave a wood in as good plight, as it was in at the time of the lease, and afterwards the trees are blown down by tempest, the covenant is discharged.

*f* And the law is the same when a thing which is due in specie, so that it cannot be discharged by an equivalent, is destroyed without any default in the debtor, or delay in returning it. If I hire a horse to ride, or use for a certain time, and within that time he dies of some disorder, I am excused from redelivering him, for the performance being impossible, by the death of the horse, the contract is discharged.

*g* But where an agreement cannot by reason of the act of God, be performed according to the words, the party shall nevertheless perform it, as near the intent of the agreement as he can.

*h* The parties to a contract or agreement, may discharge it by any collateral satisfaction, on which they shall agree. As a bond for a hundred pounds in money, may be discharged by any collateral satisfaction.

*9th.* We proceed to unfold, how contracts may be fulfilled. It may generally be remarked, that a contract is to be fulfilled, by the performance of the thing stipulated at the time agreed on. Under this head the law respecting tendries will be considered.

*i* A tender is an offer to pay a debt, or perform a duty. Wherever the right to tender is personal, the tender must be made by the party himself, or by some person authorised for that purpose. Where the right is not personal, a tender may be made by any person, who is privy to the party, who has the right of tendry ; as the heir or executor, in cases where the tender is not confined to the person only.

*k* A tender may be made to any person, who either as party or privy, has a right to the thing tendered. Of course, tender to an

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*f* Palmer, 548. *g* 1 Powell, 448. Plowd. 284. *h* 7 Mod. 144. *i* 5 Bac. Abr. 1, 3, 7. Report 13. 1 Inst. 208. *k* 5 Bac. Abr. 10. Cro. Jac. 245.

executor, or administrator is good, because they are privy in representation. So a tender to the assignee of a thing in action, is valid.

1 To make a tendry valid, it is necessary for the person making it, to declare on what account it is made. It is not sufficient for a person to say, that he is ready to pay the debt, or perform the duty, but he must make an actual offer to pay the one, and perform the other. Money must be tendered in such manner, that it may be in the power of the person to whom it is tendered, to receive it, otherwise the tendry will be void. If a man say he is ready to tender the money, but keeps it in a bag, under his arm, it is not a good tendry : but if he make an actual offer of the money in the bag, and can prove that the sum intended to be tendered was in the bag, it is sufficient ; for it is usual to carry money in a bag, and it is the duty of the person who receives it, to tell it, and see if it be good. In a contract to transfer stock by a certain time, it is said to be sufficient to offer to transfer it, without an actual transference, if the other party be not present to receive it.

\* All contracts for the payment of money, may be discharged by Spanish milled dollars, weighing seventeen pennyweights and six grains, at the rate of six shillings each, and other silver coin in proportion thereto, according to its weight and fineness, and by gold coin of the fineness of half johannes, at the rate of five shillings and fourpence a pennyweight, and so in proportion according to its weight and fineness.

\* If a greater sum of money be tendered than is due, it is good, for the greater contains the less : but the person to whom it is tendered, must take no more than is due, and if he does, he is responsible for it. \* Where a tender is to be made of any sort of goods, unless they are to be delivered according to some sample, it should be made in a middling kind of goods of the sort. \* If a contract be made to pay money, or any collateral article, at a certain place, a tender can only be made at such place : but if no place be appointed, the general rule is, that the tendry must be made to the person, at the place where he is, if he be within the same dominion : but the debtor is not bound to go into a foreign country, in search of

1 5 Bac. Abr. 4. 2 Lev. 209.  
\* 4 Bac. Abr. 6. \* 1 Inst. 280.

\* Statutes, 160.

\* Strang. 916.

of the creditor. If the creditor be within the United States, I presume the tender in these cases must be made to him in person. But if the goods to be delivered, are heavy, and difficult to transport, the debtor, if no place be appointed for their delivery, must apply to the creditor, and enquire of him at what place he will receive them, and then a tender at such place is good.

¶ In respect of the time of tendering, it may be observed, that when the contract is to pay money, deliver goods, or perform any act, at a certain day, the tender must be on such day. So if money be to be paid, or goods delivered on or before a certain day, a tender cannot be made before the last day limited for the payment, or delivery.

¶ Where money is to be paid, or goods delivered at a certain place, on or before a certain day, the tender must be made at the uttermost convenient time on that day; for as the debtor has till that time to make the tender, it would be unreasonable to require the attendance of the creditor, before that time; but the tender ought to be made time enough before the setting of the sun, to examine and tell the money, or take account of the goods. / If both parties meet at the place at any other time, on the last day, besides the uttermost convenient time, or upon any other day within the time limited, for the payment, or delivery, and a tender be made, it is good.

¶ But where payment cannot be made at the uttermost convenient time of the day before the sun sets, by reason of some circumstance not in the power of the parties, then a tender at the uttermost convenient time, in which it can be made, is good. As in case of a contract to transfer stock, an offer at the uttermost convenient time, before the usual hour of shutting the books, is valid.

¶ If money is to be paid, or goods delivered, at a certain place, tho no time be fixed, yet notice to the party, that payment will be made at a certain day, a tender at the uttermost convenient time of that day is good. Where a person has a right to pay money at a certain place, when he pleases, he must give notice to the creditor of the day, he will pay the money, and then a tender at the uttermost convenient time of the day, is good. If no time of paying money

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9 5 Bac. Abr. 8. Plowd. 172. r Ibid. 5 Rep. 114. f 3 Lev. 104.  
Cro. Eliz. 14. 9 5 Bac. Abr. 9. 11 Inst. 212.

ney, or delivering goods, at a certain place, be fixed, yet if the parties meet at any time at the place, a tender is good.

If no time be fixed for the payment of money, or if it be made payable on demand, the debt is instantly due, and the creditor need make no demand. If the contract be for the payment of some collateral article, and no time be fixed, or it be payable on demand, it is necessary that the creditor should make a special demand of the debtor, for the article to be delivered, before he is bound to deliver, and if he fail to do it in a reasonable time, then the contract is violated, and the creditor is not obliged to receive the collateral article, but may demand the money.

¶ Where the contract is to pay articles to a certain amount of a general description, as articles of shop work, it is necessary in a plea of tendry, to point out, and of course in the tendry to set out the particular articles whereby they can be known and distinguished from others: for if the tendry be good it is a bar to an action on the contract, and the articles vest in the person to whom tendered, and they ought to be identified, that he may know what article belongs to him.

¶ As to the effect and consequence of tenders, it may be laid down as generally the case, that where contracts are made for the delivery of goods, or the performance of some duty, a tender by one party and a refusal to accept by the other, discharges the contract. As for instance, if I promise to deliver, a person so many horses, on such a day, at a certain price, and I tender them accordingly, my promise is fulfilled, and the property of the horses vest in the person to whom they are tendered, and they are at his risque.

In cases of contracts for the payment of money, a tender and refusal discharge the debt, where the case is so circumstanced that there is no remedy left to enforce the payment; but the general rule is, that upon a contract for the payment of money, a tender at the time, and refusal, does not absolutely discharge the debt: but the debtor is bound to keep the money, and if the contract carries interest, that will stop. If the creditor bring an action on the contract, the tendry may be pleaded in bar of the action. But tho the right of recovery on such contract, may be suspended

suspended, by force of a tender, yet a subsequent demand of the money, and refusal to pay it, revives the original contract with the interest, and then an action will lie to recover it. A tender therefore never vests the property of the money tendered in the creditor, but the same remains in the person who tendered, and he is therefore bound to keep it, and whenever a demand is made, to pay it. If he be sued on such contract, after the tender, he must plead in bar of the action, not only the tender, but he must aver that he has been always ready to pay the money, that he still is ready to pay it, and must offer, and produce it in court, for the purpose of keeping his tendency good, and avoiding a recovery on the contract. But where a debt is wholly discharged by a tender and refusal, it is necessary to plead the tender only.

y It is a settled principle of law, that where a man would upon doing a previous act, have acquired a right to a debt or duty, this is as completely acquired, if he make a tendency of doing the previous act, and the other party refuse to suffer it to be done, as if it had been actually done. Thus if a man should agree with another, upon the payment of one hundred pounds to give him a lease of certain lands. If the money be tendered, and a refusal to accept it and give the lease, an action will as well lie upon this agreement, as if the money had been actually paid and received, and then the lease denied. And it is to be observed, that every consequence which would have followed from a tender and refusal, will follow from being ready to tender, in case the person whose duty it was to be present at the place, where the tender was intended to have been made, neglected to be present.

In all contracts for the delivery of goods, if payment or tendency be not made at the time, the contract is broken, and no subsequent tendency of the article promised can be made, but the creditor has a right to demand the money. The debtor cannot fulfil his contract but he may tender money to the amount of the value of the goods, by way of amends: which is a principle of law, introduced by our courts.

\* Where the obligation is for a sum of money to be paid in a collateral

y Bac. Abr. 14.      z Sessions vs. Ainsworth, S. C. 1790.



lateral article, the debtor may tender the money in discharge of it, and it will be good.

By the common law, in all contracts for money only, if the money be not tendered on the day limited for the payment, no subsequent tendry can be made : but the creditor, if he pleases may put the party to the expense of a suit, tho he offers to pay the money ; and to pay the same sum, which the creditor is entitled to recover by the judgment of a court of law. It must be very apparent to the eye of reason, that it is a great hardship and highly unjust, that when the parties know the sum, that is to be paid, that the debtor cannot compel the creditor to receive it ; but must be put to the expense of a suit. Our courts have never adopted this rigid principle of the common law ; but guided by the plain dictates of reason and justice, we have introduced the practice of permitting a tender to be made, notwithstanding the day of payment is elapsed, of the same sum of money which the creditor would be entitled to recover by action, and such tender has all the legal effect of a tendry at the day. This sum is the principal and the interest, and if a suit has been commenced, then the legal cost till the time of the tender. This is a principle of common law established by our courts, and is a great improvement upon the common law of England.

10. We consider how Contracts may be discharged.

We have already remarked, that contracts may be discharged by an express or tacit acquittance. In addition to this, it may be observed, that contracts may be discharged by paying the thing due, and an acceptance by the creditor. It is a doctrine of the common law, that no contract can be destroyed or discharged but by evidence of as high a nature, as the contract itself. Accord and satisfaction is no discharge of a covenant, and payment is no plea to a bond, because being deeds, no plea of an act of the obligor is admitted, and the release must be under hand and seal. But in this state we have never adopted this distinction, which is so repugnant to common sense. A parol release would not by our law be a bar, but a written release, tho unsealed, will discharge any contract

contract of ever so high a nature. Accord and satisfaction, and full payment, are effectual pleas, supported even by parol testimony, to bar actions brought on covenants, bonds and contracts, of every description. So that we may say with truth, that all contracts may be discharged by payment and satisfaction.

11. We shall close this long chapter, by considering how Contracts may be avoided.

A man may avoid his contracts, by a variety of ways already enumerated, but under this head we shall treat of duress, and usury.

To constitute a contract, it is essential that the person contracting, give his voluntary assent, and if he be compelled to make the contract by force and violence, the law calls it duress, and such contract is not binding. There are two kinds of duress, by imprisonment, and by threats.

a Duress of imprisonment, is where a person is illegally imprisoned, by confinement in a common goal, or by the restraint of his lawful liberty elsewhere: when a person under such restraint, enters into a bond or other security, to the person who unlawfully restrains him, for the purpose of gaining his lawful liberty, he may avoid such bond, or security for duress of imprisonment. But where a person is lawfully imprisoned and enters into a contract to obtain a discharge from imprisonment, this is not duress, and the contract is binding. b Duress by threats, is either for fear of loss of life, of limb, of mayhem, or imprisonment, and this must be a well grounded fear, which might operate upon a man of constancy and firmness. But a fear of battery, tho never so well grounded, is not duress, nor the fear of having one's house burned, or his goods taken away or destroyed: because in such cases, should the threat be performed, a man may have satisfaction, by his action to recover damages, but no compensation can be made for the loss of life or limb.

c Duress to avoid the contract, must be done to the party himself. If two enter into an obligation, for duress to one, the contract

a 2 Bac. Abr. 156. Co. Lit. 253. Leon. 239. b 2 Inst. 483. 2 Mol. Abr. 124. c Ibid. 687. 2 Bac. Abr. 157.

tract may be avoided by him, on whom the duress was practised, but is binding on the other. Duress by a stranger, by the procurement of the party, that is to have the benefit, is a good ground to avoid the contract, but duress by a stranger, without the privity of the obligee, is no cause to avoid. A son may avoid his contract for duress, to his father, and the father for duress to his son, and the husband for duress to his wife, but the servant cannot avoid his contract for duress to his master, nor the master for duress to his servant.

Usury is the taking of more than six per cent. for a year, upon the loan and forbearance of the payment of money, or any collateral article.

*d* It is enacted by statute, that no person or persons whatsoever, upon any contract made, shall take directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of six pounds for the forbearance of one hundred for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time : and that all bonds, contracts, mortgages and assurances whatsoever, made for the payment of any principal, or money lent, or covenanted to be lent upon, or for usury, whereupon and whereby, there shall be reserved or taken, above the rate of six pounds in the hundred, as aforesaid, shall be utterly void.

All contracts which expressly carry more than lawful interest, or, which include as principal, a greater sum than was due, or loaned, for the purpose of securing unlawful interest, are within the statute. As for instance, suppose I borrow of a person, one hundred pounds, and give him a note for a hundred and ten pounds with lawful interest, intending by the ten pounds to secure the usury, the contract is void. So if I am indebted to a person, and he calls on me to renew my security, and I secure therein unlawful interest, that had previously arisen, the new contract is usurious. So it is, if I have paid unlawful interest from time to time, and that is not deducted at the time of giving the new secu-

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rity, it is void ; because it contains a greater sum than is due, which is owing to the usurious agreement. Where a usurious agreement is made, and various securities are executed for the purpose of carrying it into effect, all such securities are void, whether usurious or not, because the general usurious intent, contaminates, corrupts and destroys every thing that is part and parcel of the agreement. Thus if I borrow of a man a thousand pounds, and give him my note for the same, payable with lawful interest, and then give him another note, for an hundred pounds, for the loan, and forbearance of the other note, over, and above the lawful interest : or if another person give him a note for the same purpose, here all the securities are void. But if my friend become surety for me, in the usurious contract, and I give him a bond of indemnity, and he is called upon, and pays such usurious contract, I cannot thereby avoid my bond given for the indemnity of the surety.

• If a contract be made for lawful interest, and then a subsequent contract be made for a greater sum than legal interest upon the first, such subsequent contract is void, but it does not invalidate the first. *f* It is a general rule, that if the principal and interest, be in hazard upon a contingency, it is no usury, tho the interest do exceed the rate allowed by law. So if there be a hazard, that the lender may receive a less sum than his principal. *g* But if the casualty goes to the interest only and not to the principal, it is usury, because he is certain to have his principal again. But it must appear upon the face, or from the nature of such contract, that there is a hazard in respect of the principal and interest, which was contemplated by the parties at the time of making the contract, and which was the foundation of the agreement, for the extraordinary premium ; *h* for if it be only a colourable contingency, manifestly to elude the statute, or if it appear that the parties did not consider the casualty as the ground of allowance, for more than six per cent. interest, then such contract is within the statute. This principle may be illustrated by the case of Hamlin vs. Fitch. *i* This was an obligation given by the defendant and one Campbell for the payment of 16839 dollars in final settlement certificates, within six months from the date with lawful interest—and the verdict of the jury was, that at the time of

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*e* Cro. Eliz. 20. *f* Cro. Jac. 208. *i* Will. 286. *g* Cro. Eliz. 642.  
*h* Co. 70. *k* Cowp. 770. *i* Kirb. 260.

giving the obligation, it was corruptly agreed between the plaintiff, said Campbell, and the defendant, to give the plaintiff one thousand dollars in lawful money, for said loan, for the term of six months, more than the lawful interest; and in pursuance of such agreement, said Campbell gave the plaintiff an obligation for that sum, which was part and parcel of the same contract. Upon this verdict, the court upon a motion in arrest, determined that the contract was not usurious, because the final settlement certificates were in a state of rapid depreciation, and there was a hazard that the plaintiff would receive a less sum in value, than the articles loaned, because he was bound at the end of six months, to receive the same kind of securities, let them be depreciated ever so much, or the value thereof in money, if he had recourse to an action to compel a payment.

\* A writ of error was brought to the supreme court of errors, and the judgment reversed. As their reasons contain some important principles, respecting usury, I shall here insert them at large.

The point of a loan, and corrupt agreement, between the parties, and Campbell, was directly put in issue, by the most correct and approved forms of pleading, and by them found for the plaintiff in error, in the very terms of the issue joined. The arrest of judgment goes upon the the ground, that no corrupt agreement could exist in a case of this nature, where the thing loaned, was in a depreciating condition, and of a perishable nature, and when the depreciation was at the risque of the lender.

1. The jury were the proper judges, not only of the fact but of the law that was necessarily involved in the issue; not only that there was in fact reserved by the agreement for loan and forbearance, more than at the rate of six per cent. per annum, but also of the legal deduction, that it was reserved by corrupt agreement. If the circumstances of the thing loaned were such, that no corrupt agreement could arise out of the transaction, the jury should have found for the defendant in error, whatever sums were secured by the notes, but as they have found a corrupt agreement, it is too late for the court to say, that there is no such corrupt agreement, the point being determined by the proper judges.

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2. The fact, that the thing loaned was in a depreciating condition, and of a perishable nature, does not appear from the pleadings, and the court could not determine the fact by enquiry in pais, or by any matter dehors, the record upon the motion in arrest. This fact therefore, which was the sole ground of arresting the judgment, the court assumed without proof.

3. Had there been evidence of the fact, it would not have justified the court in arresting judgment, or in giving judgment for the defendant in error on the demurrer, for there is no article whatever, that can be loaned but what may and frequently does change its relative value, not excepting gold and silver coin, and if it be lawful for the lender, to reserve more than six per cent. per annum, to secure him from a possible loss, arising from a depreciation in one thing, he may in all : but this would destroy the statute against usury, and render it of none effect.

4. Whether at the time of the contract, in the present case, the article loaned, would appreciate, or depreciate, was perfectly uncertain, and a contract which in its creation was usurious, could never be saved by any subsequent contingent loss, in the value of the principal loaned.

5. This contract, was not a bargain of hazard, as in the case of money lent on bottomry bonds, where the lender, by the act of lending, is exposed to the loss of his whole principal : for in this case, the securities loaned, were equally liable to loss by depreciation, in whosever hands they were, and the lending did in no measure encrease the risque.

A very common practice has taken place as a cover to usurious contracts, to loan a person money, and then make him purchase articles at a price, above their value, sufficient to secure the unlawful interest, and put the whole debt into the same security. The difficulty of ascertaining the precise value of goods, and of proving the usurious intent, has hitherto rendered this mode an effectual safeguard for usury ; but there can be no doubt, if proof can be adduced, that under these circumstances, a higher price is given for goods, than their actual value, for the purpose of concealing the

the usurious intent of the contract, that such deceitful practices will be deemed an indirect mode of taking unlawful interest, and such securities may be declared void. /

• Where a note contains unlawful interest, and being put in suit, judgment is rendered upon it, on a hearing in damages, and a new note given for the judgment, the debtor cannot in an action on the new note, resort back, and take advantage of any unlawful interest included in the first note.

• Where an obligation is given for the price of goods on absolute sale, tho ever so dear, it cannot be deemed usury. So where public securities were sold to a person for a certain sum, for which a note was taken, and an agreement made, that the debtor might return the specific notes, within a certain term, or the note should be paid in specie only, here tho the public securities were of less value than the sum secured by the note at the time of the sale, yet as the contract was for a sale, optional however with the purchaser to return them or pay the note within a certain time, it could not be usury.

• The law makes void all obligations, for more than lawful interest, and the party may not resort to an original just debt, which was secured by a usurious obligation, as the ground of another action, after such obligation has been declared void by a court of law : for the loss of such debt is a penalty on the usurer, and if he might recover it by a different form of action, the statute would be defeated.

• Where a person takes a note for a sum justly due, and at the same time, as parcel of the contract, the parties make a parol contract for the payment of a certain sum over and above the lawful interest for forbearance of the note, it has been determined that such note is void, tho no recovery could have been had on the parol contract.

The statute respecting usury, further enacts, *g* that in any action brought on any bond, bill, mortgage, or other instrument whatsoever, it shall be lawful for the defendant, to inform the court

by  
*l* Doug. 708, Cro. Eliz. 104. • *Vourse vs. Gibson*, S. C. 1791. • *Wadsworth &c. vs. Champion*, S. C. 1792. • *Cowls vs. Hart, &c.* S. C. 1792.  
*p* *Atwood vs. Whittelsey*, S. C. 1793. *g* Statutes 261.

by filing his bill with the clerk, on the second day of the court, that such contract is usurious and oppressive, and for no just or reasonable consideration, and such court may proceed in searching the truth of such complaint, as a court of chancery, by examining the parties on oath, or in any other way proper to a court of equity, and if the plaintiff refuse to be examined on oath, he shall become nonsuit, and if on trial, the court find the contract to be usurious, they may adjust the same in equity, and give judgment that the plaintiff recover no more than the just value of the goods sold, or than the principal sum which the defendant received of the plaintiff, without interest, or any advance thereupon.

In construction of this statute, it has been determined that the defendant cannot be examined upon oath—but he may call on the plaintiff to testify, and then adduce any other proper proof.—But the plaintiff may appeal to the conscience of the defendant, and call upon him to testify.

## CHAPTER TWENTY-SIXTH.

## OF TITLE BY GIFT, SUCCESSION, COPY-RIGHT, AND FORFEITURE.

I. **O**F title by gift. The transference of personal estate by gift, is gratuitous—which distinguishes it from contracts, for gifts are without and contracts upon consideration. Every person has an absolute power of disposing of his personal estate. Of course, a voluntary gratuitous conveyance, without consideration, is equally valid and effectual, as a conveyance on sufficient consideration, unless it be where strangers, or creditors are affected. It has therefore become a settled maxim, that tho a conveyance by gift, shall be conclusive upon the giver, yet it shall not operate to defeat bona fide creditors of their just debts: for if a man should make a gift of his estate, either real or personal, and should not have enough left to discharge his debts, the creditors may take the estate which he has given away, in payment of their demands. For it is a maxim of law, as well as a principle of morality, that a man must be just, before he is generous.

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A gift must be accompanied with the immediate delivery of possession, so that the transference may instantly take effect, and the gift become executed, by vesting the property of the thing given, in the donee. This may be verbally before witnesses, or in writing, there being no particular mode adopted by law, as the requisite of such a mode of conveyance ; it being sufficient to shew that the donor meant to transfer and deliver the property to the donee. When a person has thus executed a gift, it is not in his power to retract it : but a mere promise to give without delivering the possession, would not be binding ; for a man cannot be compelled to fulfil a promise made upon no consideration. A man however, will not be bound by a gift, where he was drawn in, circumvented, or imposed upon by false pretences, ebriety or surprise.

A gift of estate, is sometimes made in the contemplation of death, and is called *donatio causa mortis*, and is a death-bed disposition of property. As where a person in his last sickness, apprehends his death to be near, delivers, or causes to be delivered to another, the possession of any personal goods, (under which has been included bonds, and bills, drawn on his banker,) to keep in case of his decease. This gift, if the donor dies is absolute, excepting against creditors, and is accompanied with this implied trust, that if the donor lives, it shall revert to himself, being only given in expectation of death.

2. Of title by succession. This is only applicable to corporations, capable of acquiring property, and the succeeding members acquire a qualified property, in all the goods of the corporation. This title to property, cannot strictly be predicated of aggregate corporations. For the corporation in legal consideration, has perpetual existence, and is not varied by the change of members. It has a certain name by which it is known and distinguished, and by which it is capable of acquiring property. This property therefore, must be considered, as vested in the corporation, which is a mere ideal entity, existing only in contemplation of law. As a corporation has perpetual duration, there can be no acquisition of property by succession, for where a member is admitted

admitted into the corporation, he becomes one of the constituent parts, and thus acquires a title to the goods of the corporation, and not by succession to any other person.

But in case of a sole corporation, and the treasurers of the state, counties or towns, may be considered as bearing some resemblance to them, there may be a succession. Therefore if a bond be given to the treasurer of the state, and his successors in that office, then on his demise, or removal from office, his successor may in his own name, bring a suit on such bond.

3. Of the title by copy right. " It has been adjudged by the courts in England, that an author by the common law, has not the sole exclusive right of printing and vending his works, but that, when once they have been printed and published, they become common property, and any person may reprint them. To encourage science and literature, by securing to authors, the benefit of their labors, it is enacted by statute, " That the author of any book, pamphlet, map, or chart, being an inhabitant or resident in the United States, his heirs and assigns, shall have the sole liberty of printing, publishing, and vending the same, for the term of fourteen years, from the publication; and if the author be then living, he, and his heirs and assigns, shall have the same right for fourteen years more. If any person within such term, shall print or reprint such books, or shall import them from other places, where printed, and knowingly vend them, they shall forfeit to the proprietor double the value of the copies printed, imprinted, vended, or exposed to sale, to be recovered in an action brought before a proper court. The author, assignee, or proprietor, must first register his name, as author, assignee, or proprietor, with the title of the work, in the office of the secretary of this state, who is empowered and directed to enter the same of record.

If the author or proprietor, neglect to furnish the public with necessary editions, or demands an unreasonable price, the superior court may order him to sell at a reasonable price, and on failure, may licence any person making complaint, to reprint and sell at such price, as the court judge reasonable.

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" Donaldson vs. Becket, 1794.

" Statutes, 113.

If any person procure and print any unpublished manuscript, without the consent of the author or proprietor, he shall pay all damages which the proprietor or author sustains. But as the Congress of the United States, have established regulations which extend to the whole empire it is not probable that authors will in future take any benefit of this statute, but will conform to the state of Congress.

4. Of title by forfeiture. In England, a man for almost all the crimes he commits, is subjected to a forfeiture of all his personal estate : but here, the only crimes for which a man forfeits his estate to the public treasury, are man-slaughter, and burning public magazines or vessels, or in time of war, voluntarily delivering them into the hands of the enemy. Man-slaughter works an absolute forfeiture of all the personal estate of the criminal ; and in the other crime, the forfeiture is dependent on the discretion of the court.

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#### CHAPTER TWENTY-SEVENTH.

#### OF TITLE BY LEGACY, DESCENT, AND INSOLVENCY.

**I**N our preceeding enquiries, we have treated of the several modes of acquiring and transferring personal things, by persons who are in being. In this chapter, I propose to consider the law respecting the settlement of estates, upon the decease of the proprietor. This will be comprehended under three heads, where the proprietor directs the disposition of his estate by will, where he dies without will, and leaves his estate to be disposed of by the operation of law ; and where he dies insolvent, not leaving a sufficiency of estate to discharge his debts. In England, the settlement of estates, composes a part of the jurisdiction of the clergy. The bishop of every diocese, exercises this power within the diocese. But in this state, the jurisdiction of the clergy is confined to things spiritual, and they cannot in virtue of their ministerial functions, intermeddle with temporal affairs. Judges of probate are appointed in certain districts, who have the cognizance of the settlement of estates.

1. A legacy, is a testamentary disposition of personal estate ; it becomes therefore necessary to prepare the way for a consideration of that subject, by an explanation of the law respecting wills.

The origin of wills, seems to have been co-eval with the existence of mankind, and they unquestionably result from the constitution of nature. The policy of different nations, has laid them under various restrictions and regulations, for the purpose of preventing fraud and dispute. The forms and requisites established by the positive laws of this state, to render a will valid and effectual, will be fully considered in this chapter, under the following heads.

1. Who are capable of making a Will.
2. The requisites of a Will.
3. Of the signing, sealing, and attestation, of a Will.
4. Of the publication, and republication of a Will.
5. Of nuncupative Wills and Codicils.
6. Of the proof, and the nature of Wills.
7. Of the revocation and avoidance of Wills.

1. I shall consider who are capable of making a Will.

All persons who are capable of making devises, are capable of making wills, to dispose of their personal estate ; and an infant, when arrived to the age of seventeen years, may dispose of his personal estate by legacy.

\* A married woman, cannot make a disposition of personal estate by will, without the consent and licence of her husband ; because all the personal estate is by the marriage vested in the husband ; but if the husband consent to the will, it shall be binding and valid : and the husband frequently covenants with the relations, or some friend of the wife, that he will consent to and allow her liberty to make a will. Such will however, is not good without the assent of the husband, tho he has contracted to grant her permission : but this will prevent him from taking administration on her estate, which shall be granted to the person by her appointed, and the husband is bound by his covenant to allow it.

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\* 5 Bac. Ab. 498. 4 Rep. 51. 2 Black. Com. 498.

If a married woman make a will, and the husband suffer it to be proved, and deliver the goods, it shall be binding upon him. The husband may at any time before the death of the wife, revoke the will, to which he has assented, but cannot afterwards, unless it be done before the will is proved. If a woman make her will, and afterwards marry, such subsequent marriage, is a revocation of the will. Traitors and felons, by the English law, are incapable of making wills, by reason of the forfeiture of their goods, but by our law, as there is no forfeiture of estate for crimes punishable with death, such criminals are not deprived of the power of making wills.

## 2. The requisites of a Will.

1. The testator must be capable to make a will, and not be under any legal disabilities. There must be some person in being, who shall be capable of taking the thing given at the time, it ought to vest, or the gift will be void. The testator at the time of making the will, must have a mind or serious intent to make a will. This must be evidenced by a solemn deliberate act, and therefore any rash, unadvised, or jesting conversation, will be of no force. The mind of the testator must also be free, and uninfluenced by fear, fraud, or flattery, for if he be moved by fear, circumvented by fraud, or overcome by immoderate flattery, the will is void. So if a man in a state of inebriety, make a will, it is void.

## 3. Of the signing, sealing, and attestation of a Will.

It is not material on what a will is written, whether paper or parchment, or in what language or character, nor whether the expressions are proper and grammatical, provided the will be legible, and the intent of the testator be discoverable: but if it cannot be read, or the expressions are so obscure, ambiguous, and uncertain, that the intention of the testator cannot be collected from it, then it is void. Regularly, a will ought to be signed and sealed by the testator—but I apprehend, the want of a seal would not nullify it. By the common law, if a testator write his name at the beginning of a will, and seals it, or seals it only, it will be

be sufficient to render the will valid. Wills that contain devises of land, must be attested by three witnesses; but where personal estate only is disposed of, no witnesses are required.

4. Of the publication and republication of a Will.

z The publication of a will, is an essential part of it, tho the law has prescribed no particular mode. Any act or declaration, importing a solemn intent in the testator, to dispose of his estate, will be sufficient; but without some such act or declaration, the instrument will not be good as a will. The delivery of a will as a deed, has been adjudged to be a good publication. A publication may be inferred from such circumstances, as evidence the intent of the testator, and will have the same force to render the instrument valid, as if expressed by parol declaration. If the testator shew the will to witnesses, saying there is my last will and testament, or herein is contained my last will and testament, this is sufficient, without making the witnesses privy to the contents, provided the witnesses can attest to the identity of the writing. It is necessary that the whole will should be present at the time of attestation, for if a man make a will on several pieces of paper, and none of the witnesses ever saw the first, this is not a good will.

\* A will if not actually obliterated and destroyed, may altho revoked, be revived by a subsequent republication: for being an ambulatory instrument, deriving its efficacy from the intent of the testator, it may be rescinded, suspended, enlarged or contracted, as to its operation at the pleasure of the testator. At common law, very slight words effect a republication, it being an act peculiarly favoured. Therefore any act done by the testator subsequent to the revocation, by which he demonstrated an intent that the will should stand, amounted to a republication.

† A codicil, tho not annexed to a will, is a republication, if it clearly relates to the subject matter of the will, thereby plainly evincing, that the testator contemplated that, as his will at the time of making the codicil.

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\* *Powell Devi.* 81, 86.

† *Ibid.* 652.

‡ *Ibid.* 658.

c The effect of a new publication of a will is, that all which the words of the will embrace at the time when the new publication is made, shall pass thereby : and the terms and words of the will, shall be construed to speak with regard to the property the testator is possessed of, and the persons named therein at the date of the republication, just the same as if he had had such additional property, or such persons had been in being, at the time of making his will, the conclusions from that fact, being that the testator so intended. The next consideration therefore, upon a will so republished, is what the words of the will at the time of republication import, for they will operate to their full extent, at that time, just the same as if the testator had then made a new will.

### 5. Of nuncupative Wills and Codicils.

Wills are of two kinds, written, and unwritten, and the latter are called nuncupative. These are allowed only in cases where in extreme and dangerous sickness, the testator has neither time, nor opportunity to make a written will—and seriously and deliberately declares his intention respecting the disposition of his estate, before a number of witnesses, called for that purpose. But this will must immediately be reduced to writing and proved before the court of probate, as soon as practicable, for the law will not suffer such things to rest for any length of time, on the memory of witnesses, on account of the danger of fraud. A nuncupative will, must be made by a man in his last sickness, at home or among his friends, or family, unless by unavoidable accident, to prevent imposition by strangers.

d A codicil is a little writing, being a supplement, or addition to a will, made by the testator, and annexed to it, for the purpose of explaining, altering, adding to or subtracting from some of the former dispositions of the estate by the will ; and this may be in writing, or without, and is then called nuncupative.

### 6. Of the proof, and the nature of Wills.

e A written will, which contains only a disposition of personal estate, is valid, and sufficiently proved, if it be written in the testator's own hand, tho it has neither name nor seal to it, nor witnesses

e Powell Devl. 674.  
Abr. 514.

d 2 Black. Com. 500.

e Ibid. 501. 5 Bac.

nesses present at the publication : but it must be written fair and plain, and there must be proof that it is his hand writing. If it be written in another man's hand and never signed by the testator, yet if it can be proved to be according to his instructions, and approved of by him it shall be good. But the better way is to have wills signed, and published in the presence of witnesses.—When a will is found among the choicest papers and evidences of the testator, or locked up in a safe place, the evidence is esteemed conclusive : but tho it be found in such places, yet if it be written in another's hand, or if the name or seal of the testator, or one of them be not annexed to it, then some further proof will be required. If a writing be found, under the testator's own hand, yet if it be but a scribbling writing, written copy-wise, with a great distance between the lines, in strange characters, with many interlineations, lying among his waste papers, this shall not be accounted his will—but a draft or direction for it : but if it can be proved that the testator declared, that this should be his will, it is sufficient proof of it, and it shall be effectual. If it be proved that the testator declared his will, was in the hands of a third person, who produces such a writing, and swears to the identity, this will be sufficient proof ; if he said it was written by his own hand, then it must be proved by comparison of hands. If a witness will testify, that the writing produced, to be the last will of the testator, is his will, or that he said it was, or that it should be, or that it is the same writing, that was shewed him, and to which he is a witness, this shall be sufficient proof, tho he never read or set his hand to it.

• In respect of the nature of wills, it may be observed, that a will differs from all other acts and deeds, which mankind do in this life : for tho it be made, sealed and published in ever so solemn a manner, yet it has no operation till the death of the testator. A man may therefore alter or revoke his will, when he pleases, and make as many new one's as he thinks proper. Every new will, is a revocation of all former one's, without any express words or declarations for that purpose : but codicils are not, because they are only additions, or supplements to them. A testa-  
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ment is said to have three degrees : an inception, which is the making of it,—a progression which is the publication,—and a consummation which is the death of the testator. When a will is perfected by the death of the testator, it transfers estates as effectually as deeds.

#### 7. Of the revocation and avoidance of Wills.

A person may revoke his will at any time when he pleases, and such revocations are express or implied. Express revocations are some positive act of the testator, and may be in writing or parol. Revocations by writing are where the testator by a subsequent will or codicil, expressly revokes a preceding will. Revocations by parol, are where the testator seriously and deliberately declares, with an intention to revoke, that he revokes his will, or that it shall not stand, or any other words clearly evincive of such intention.

Implied revocations, are where the testator makes some declaration, or does some act which amounts in law to a revocation, because it furnishes the ground to presume that his mind is changed. If he declare, that a certain person who is his heir at law, shall inherit his estate, this will revoke a will giving it to a stranger. So a subsequent will or a codicil, different from the former, tho containing no express words of revocation, will revoke it. So if the estate be altered, fold, lost, or consumed.

A will may be avoided and set aside by the courts of probate, or by the superior court, on an appeal to them, when the testator had not a legal capacity to make it, and where any artful fraudulent plans or undue measures, were practised to circumvent him ; as if advantage is taken of his age, infirmity and weakness, and it appears that the will was not altogether voluntary, and framed agreeably to his true intent and design, respecting the disposal of his estate. But where a man<sup>a</sup> in the exercise of his rational faculties, and free from any restraint upon his mind, makes a testamentary disposition of his estate, it is not in the power of courts of law or equity to set them aside ; tho he may have made a very improper disposition of it, and disregarding children and relations, has given it to utter strangers. For as he has an absolute power to dispose

dispose of his estate by will, the law regards not the person to whom it is given, but only considers whether he acted voluntarily and possessed the exercise of his reason at the time of the transaction.

In the next place, I proceed to the consideration of the office and duty of an executor. It is an essential ingredient in a will, that an executor be appointed to carry it into execution, and if none be appointed, it is to be considered as a codicil rather than a will: but if by any means an executor be wanting, the court of probate may supply the defect. For the illustration of this subject, I shall consider,

1. Who may be Executors, and of Administrators who act instead of Executors.
2. Of the power and duty of Executors.
3. Of Co-Executors, and when Executors are liable to pay the debts out of their own estate.
4. Of actions brought by, and against Executors.
5. Of Executors in their own wrong.

1. Who may be Executors, and of Administrators who act instead of Executors.

§ Every person who is capable of making a will may be appointed an executor, and so may married women and minors, who are capable at the age of seventeen years, of executing the trust. But where the testator appoints no executor, or the executor dies, or refuses to accept the trust, or to give bonds with surety, for the faithful administration of the estate, then the court of probate may commit administration of the estate, with the will annexed, to the widow or next of kin, and upon their refusal or incapacity, to one or more principal creditors, as they shall think fit, and in case the executor appointed by the testator, be under the age of seventeen years, then an administrator may be appointed during the minority of such executor; and in these cases, the administrator with the will annexed, is in the same situation with the executor, only one derives his authority from the appointment of the court of probate, and the other from the will, but their power and duty are the same.

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*b* If a person dies intestate, and administration is granted upon his estate, and the administrator dies, without having fully administered, then new administration must be granted by the court of probate, of the goods and estate not administered, : for the first administrator cannot continue the trust reposed in him, to his executor or administrator. But if an executor dies, not having fully administered, and appoints an executor, the trust devolves upon him : if he dies without an executor, then administration must be granted upon the estate, not administered, with the will annexed.

The court of probate, may cite the widow, next of kin and creditors, to take letters of administration in these cases, and on their refusal, may appoint others.

## 2. Of the power and duty of Executors.

*i* A person knowing that he is appointed executor of the will of any deceased person, must within thirty days after the decease of the testator, cause such will to be proved, and recorded in the register's office, in the district where the deceased last dwelt, or present said will, and declare his refusal to accept of the executorship, upon penalty of forfeiting, without sufficient excuse made and accepted by the judge of probate, five pounds per month, after thirty days, till he cause the same to be done.

*k* An executor must see that the deceased is buried in a manner suitable to his rank and dignity in life, and all reasonable expenses will be allowed. He must cause the will to be proved in the probate court, and there lodged and recorded. The probate of the will, in the district where the deceased last dwelt, is sufficient and will extend thro the state

*l* The executor must give bonds with surety, for the faithful management and settlement of the estate. He must collect all the estate of the deceased, and calling two or more disinterested judicious freeholders, neighbours and friends to the deceased, he must in their presence, and by their direction, they being under oath, cause to be made a true and perfect inventory, of all the estate of the deceased, both real and personal, and cause the same to be indented

*8* 2 Bac. Abr. 385. *Swiab.* 298. *1* Statutes, 52. *k* 2 Black. Com. 508. *l* Statutes, 52.

dented, one part of which, shall be kept by the executor, and the other part be lodged with the court of probate. If the executor neglects to make an inventory within two months after the decease of the testator, without sufficient excuse made to the acceptance of the judge of probate, he shall forfeit five pounds per month, till the same be done. An inventory purports not only an account of all the estate, but an appraisal at its just value.

■ An executor in virtue of his office, gains a temporary qualified property, in all the personal estate of the deceased : but he has no power over the real estate, only to cause it to be inventoried and appraised, unless there be more debts that can be paid by the personal estate, in which case the court of probate may order a sale of sufficient real estate, to be made by the executor, to discharge the debts. But the real estate, is supposed on the death of the testator, to descend instantly to the devisees.

The executor has full power, to sue for and collect all debts due to the testator, and to recover all the goods and chattels which belonged to him ; for he is considered as the representative of the deceased, and is invested with the same power. Whatever debts are recovered, and whatever estate is of a saleable nature, and may be converted into money, are called assets in his hands ; which he may convert into ready money, and pay the debts and demands upon him, as executor.

■ If any person or persons, in this state, shall have in their custody, any goods or chattels, belonging to the estate of any deceased person, or any bills, bonds or accounts, or such other things as may tend to disclose such estate, and on demand by the executor, or administrator, shall refuse to make delivery, or give a satisfactory account, it shall be in the power of the next assistant or justice of the peace, to issue a warrant to apprehend and bring such persons before them, and bind them with sufficient sureties, to appear before the next court of probate, who are empowered to examine them on oath, respecting such things ; and on their refusing to answer every interrogatory, to commit them to goal, till they conform.

The executor must pay the funeral charges of the deceased, and the expense of settling the estate, and also all his just debts. To ascertain the debts, and bring estates to a speedy settlement, it is enacted by statute, \* that the courts of probate be empowered to direct executors and administrators, to give public notice to the creditors, to bring in their claims within such time, as the court shall limit, not exceeding eighteen months, nor less than six, by posting up the same in the town where the deceased last dwelt, and by advertising in one or more of the public newspapers in the state, and any further notice that the court shall judge necessary : and if any creditor, shall neglect to bring in his claim within that time, he shall be forever debarred of any recovery, excepting creditors living out of the state, who may exhibit their claims within two years, after publication of notice : and shall be entitled to receive payment out of the clear estate that remains after the payment of the debts exhibited in the limited time.

When the debts are ascertained, it becomes the duty of the executor to pay them, and for that purpose, he may dispose of the personal estate of the testator ; † and if that be insufficient, then in cases, both of testate and intestate estates, it is in the power of the court of probate, to order the sale of so much of the real estate, as shall raise sufficient money to pay the same, with incident charges of sale, in such manner as shall appear to be most beneficial to the estate. An executor in the settling and paying of debts, must consider them all, as standing on the same basis : and whether they are secured by judgment, specialty or simple contract, there is no preference. By the common law, if a man makes his debtor his executor, this shall be a release of the debt, in preference to legacies, provided there be sufficient assets to pay the debts.

When the debts are all paid, then it becomes the duty of the executor, to deliver over the estate, agreeable to the directions of the will. Where the legacy is in some specific article, then the delivery of that article, will discharge the executor : if it be for the payment of a certain sum of money, the payment of that sum, discharges

discharges the legacy : but if the legacy be not specific, and contains a certain portion of goods, then a legal distribution must be made by distributors, appointed for that purpose by the court of probate.

3. Of Co-Executors, and when Executors are liable to pay debts out of their own estates.

A testator may appoint different persons to execute different parts of his will ; but a sole executor, cannot accept to execute a part and not the whole. If a man appoint several joint executors, they are esteemed as one person, representing the testator, and therefore, the acts done by any one of them, which relate to either the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all ; for they have a joint and entire authority over the whole.

It seems to be a settled principle, that one executor, shall not be charged with the wrong or waste of his companion, and shall be liable no further than for the assets that came to his hands. One executor cannot regularly sue another, for any thing that relates to the will, or that is within the power, duty and office of an executor. It is enacted by statute, that executors, who are also residuary legatees, when all or any part of their legacies are withholden from them, by their co-executors, may bring their action of account against their co executors, for the recovery thereof : and the like action is allowed to the residuary legatees, against executors. As joint executors, in representing the testator, make but one person, they must all join in suing, and all be joined when sued, but of this, no advantage can be taken only in abatement.

The executor is liable to pay debts out of his own estate when the creditor has recovered judgment against him, in the capacity of executor, and taken out execution against the estate of the deceased in his hands, and the executor neglects or refuses to deliver such estate upon the execution, and the same is returned non est inventus. Then the creditor may bring a scire facias against the

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executor

2 Bac. Abr. 395.

2 Godolph. 134. Cro. Eliz. 318.

executor, and have judgment affirmed against his person and estate.

A *devastavit*, is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets, contrary to the trust and confidence reposed by them, and for which, by the common law, executors and administrators are answerable out of their own property, as far as they had or might have assets of the deceased. Executors may be guilty of a *devastavit*, not only by a direct abuse, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration, as disappoint creditors of their debts. Therefore selling things under their value, or neglecting to sell them at a proper time, will amount to a *devastavit*. If an executor who releases a debt, shall be charged to the value of it, let him receive ever so small a sum. If he pays money in discharge of a usurious bond, entered into by the testator, it is a *devastavit*, if he be knowing to the fact. By the common law, if he take a bond in his own name, for debt due by simple contract, he shall be chargeable as much as if he had received the money.\* But in this state, I presume that the taking a note for a book debt, or a new note for an old debt, would not charge the executor, if he be guilty of no neglect. So if an executor submits the debt, or whatever he is entitled to, in right of the testator, to arbitration, and the arbitrators award him less than his due, this being his own voluntary act, shall bind him, and he shall answer for the full value.

By our law, an executor or administrator, can never plead that he has no assets; or that he has fully administered. For in all cases, where the estate of the deceased is insufficient to pay his debts, the estate must be represented insolvent, and then settled in the manner prescribed by law. No action therefore is ever brought by a creditor against an executor or administrator, on the ground of a *devastavit*; for if the estate be solvent the *devastavit* of the executor, is no injury to the creditor: and if it be insolvent, then an action is brought on the bond; given by the executors to the court of probate, for the benefit of the creditors; in which  
action

\* 2 Barr. Abr. 431. f Hob. 66. i Ibid. 167. u 2 Lev. 189.  
w 3 Leon. 41.

action full damages may be recovered, not only for a devastavit, but for any default or neglect in the administration of the estate. In like manner, where the estate is solvent, and the administrator or executor guilty of a devastavit, action will lie on the bonds to recover the damages sustained by the heirs and legatees.

#### 4. Of actions brought by and against Executors.

\* An executor stands in the place of the testator as his representative, he may therefore maintain an action in his right, upon all contracts, on which action would lie in favour of the testator: and is liable to actions on all contracts made by the testator, on which he was liable himself. But by the common law, an executor cannot bring an action of trespass, for a tort done to the person, or goods or chattels of the testator, in his life time. y But it has been adjudged, that an administrator may bring trover for goods converted in the life time of the intestate.

Executors or administrators after the will is proved, may bring trover for the goods of the deceased, converted by a stranger, before the will is proved. For altho an executor has no property in the goods of the testator till he has proved the will, yet as soon as this is done, he does by relation acquire a general property therein, from the time of the death of the testator: and in such cases, he need not name himself as executor, because his action is grounded on the qualified property, acquired as executor, which is sufficient to maintain his action.

z When an action of debt is brought against an executor, it must be in the detinet only; for he is not personally liable, but only in respect of the testator's estate, he therefore cannot be said to owe. The deceased in his life time may be said to have owed the debt, and the executor detains it. In England, the personal estate only, is assets in the hand of the executor, for the payment of debts, and the real estate descends to the heirs. In case the personal estate proves not sufficient to pay the debts, actions will lie against the heirs on all contracts where they were bound.—

a But in this state, the real estate as well as the personal is charged with the payment of debts. if necessary, and is assets in the hands

of  
\* 2 Bac. Abr. 443. y Kirby vs. Clark, S. C. 1792. z 1 Roll.  
Abr. 603. a Phelps vs. Miles, &c. S. C. 1790.



of the executor or administrator, and may by them be disposed of for the payment of debts. The statute law has provided modes, by which all the estate of the deceased if necessary, may be applied in payment of his debts, before it can vest in his heirs. It is therefore necessary that provision should be made for an action against them, for a debt due from the deceased.

*b* Action of assumpsit was brought against an administrator, stating a debt against the intestate, that real estate had been sold to pay debts, and the defendant had the money in his hands, laying a promise of the administrator, to pay in his personal capacity. On the plea of non-assumpsit, the court were of opinion, that the administrator, receiving a sufficiency of the estate of the intestate, did not subject himself to an action, to pay out of his own estate in the first instance.

*c* The law respecting the actions that can be maintained against executors and administrators, is settled by lord Mansfield, in the case of Hambly against Trott, with a perspicuity and elegance, that distinguish all adjudications of that great man and respectable judge.

The maxim, that personal actions die with the person, is denied to be generally true ; and he makes a distinction between actions, which survive against an executor, or die with the person, on account of the cause of action, and actions that survive against an executor, or die with the person on account of the form of action.

1. Where the cause of action, is money due, or a contract to be performed, gain, or acquisition of the testator by the work and labour, or the property of another, or a promise by the testator express or implied,—where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises from a crime, supposed to be by force, and against the peace, the action dies : as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many others cases of like kind.

2. As to those actions which survive or die, in respect of the form of action. In some actions, the defendant could have waged his law, and therefore no action lies in that form against an executor

utor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action, where in form, the declaration must be with force and arms, and against the peace, or where the plea must be, that the testator was not guilty, can lie against the executor.—Upon the face of the record, in such case, the cause of action arises from a tort or crime, and all private, criminal injuries, as well as all public wrongs, are buried with the offender.

But in most, if not all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose.

An action on the custom, against a common carrier, is for a tort and supposed crime. The plea is not guilty, and therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor, tho it would against him—but an action for the use and hire of the horse, will lie against the executor.

An action was brought against an executor, alledging the delivery of a cow, to the testator, to keep for the use of the plaintiff, and that the testator sold the cow, and converted the money to his own use. Here the executor cannot be chargeable in trespass, or trover, for the wrongful act of converting the money; but an action will lie against him for the money had and received, by the testator.

There seems to be this fundamental distinction. If it is a sort of injury, by which the offender, acquires no gain to himself, at the expense of the sufferer, as beating, or imprisoning a man, there the person injured has only a reparation for the crime in damages, to be assessed by a jury. But where besides the crime, property is acquired, which benefits the testator, there an action for the value of the property, shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall.

So far as the tort itself goes, an executor shall not be liable, and therefore it is, that all public and private crimes die with the offender, and the executor is not chargeable : but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.

5. Of Executors in their own wrong, or de son tort.

An executor in his own wrong, is a person who without any authority from the deceased, or the court of probate, does such acts as belong to the office of an executor or administrator. There are a variety of acts which will make a man an executor in his own wrong, such as possessing, and converting the goods of the deceased to his own use, paying his debts out of his assets, suing for, and receiving his debts, and generally all acts of acquiring, possessing, and transferring the estate of the deceased, will make a man an executor in his own wrong, because these are the only indicia, by which creditors can know against whom to bring their actions : and therefore in suits against executors in their own wrong, they are named as executors generally. A person may be an executor in his own wrong, by releasing debts due to the deceased, by paying legacies with his effects, by entering on a specific legacy without the executor's assent, by paying and discharging the mortgages of the deceased with his money and goods : by delivering to the wife of the deceased, more apparel than is suitable for her, or by answering as an executor to any action brought against him, or by pleading any other plea, than that he never was executor.

A man may take care of the funeral of the deceased, feed his cattle, take an inventory of his estate and effects, discharge his debts and legacies with his own money, repair the houses in decay, and provide necessaries for his children, without being an executor in his own wrong, for these are acts of kindness and charity.

There cannot regularly be a rightful executor, and an executor in his own wrong, for when there is a rightful executor or administrator, a stranger who acquires possession of the goods of the deceased, is a trespasser, and may be sued as such : but this must be understood where he takes possession of the goods, as a trespasser, for  
if

If there be a rightful executor, and a stranger takes the goods of the testator or intestate, and claiming to be an executor, pays debts, and legacies, receives debts, enters upon a term for years in name of the deceased, or otherwise intermeddles, he is an executor in his own wrong. If a stranger get possession of the estate, before the probate of the will, he is an executor in his own wrong, because the lawful executor can only be chargeable with the goods that come to his hand. But he may bring an action against the wrongful executor, who cannot plead payment of debts to the value, or that he has given the goods in satisfaction of debts : because no man may obtrude himself upon the office of another, but on the general issue, such payment may be allowed in mitigation of damages.

The value of the thing taken by a stranger, so as to make him an executor in his own wrong, is immaterial, where he pleads that he never was executor, and they have been subjected to pay a debt of sixty pounds, for taking a bedsted, and a hundred pounds for taking a bible. By the common law, an executor in his own wrong, may pay just debts, and he is liable to the amount of the estate that comes to his hands, and may plead that he has fully administered. But as our law admits of no such plea, and as a person when he is once an executor in his own wrong, can not exculpate himself by taking letters of administration, but may still be sued as an executor in his own wrong, it follows in the case of an insolvent estate, that a man for intermeddling might be subject to the payment of all the debts, let him receive ever so small a sum, because he cannot represent the estate insolvent.

Having considered the nature of Wills, and the office of Executor, I shall in the next place treat of legacies, which are the substantial part of wills, and the payment of which constitute a principal branch of the duty of executors.

A legacy is defined to be a bequest, or gift of goods, and chattels by testament, and the person to whom the gift is made, is called the legatee. Properly speaking, devise relates to a gift of lands by will, and legacy, to a gift of personal estate, tho they are

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K k k

both

f 2 Black. Com. 310. 3 Bac. Abr. 466.

both sometimes used indiscriminately. Any words that can be used which signify an intention to make a gift of some chattel to some person, who is so described that he can be known, will constitute a legacy ; and any person in being is capable of taking a legacy. The general principles already stated respecting devises, will apply to legacies, excepting that general words in a will, will dispose of all the personal estate, the testator owns at his decease, tho acquired after making the will.

*g* An ademption of a legacy is revocation of it, and a translation is the giving the thing to some other. *h* Where the testator makes a legacy to a person of the same, or a greater sum than he is indebted to him, if it appear that such legacy was intended to go in satisfaction of such debt, then such person is not entitled both to the legacy and debt. But if the legacy be less than the debt, or payable in a different article, or if it does not appear that such was the intent of the testator, then the legatee ought to recover both, for it cannot necessarily be presumed, that the testator intended that the legacy should discharge the debt.

Legacies on condition must be governed by the same general rules of construction, as conditional contracts, excepting where they are in restraint of marriage, and there the rule is that all conditions for the restraint of marriage generally, are void, because they are prejudicial to society : but that a condition which restrains marriage as to time, place, or person, is good.

*i* Legacies are general, and pecuniary, as where a certain portion of goods, or money are given. Specific, as where some particular article of estate is given, as a piece of plate, a horse, or the like. Where there is a deficiency of assets to pay the debts, all the general legacies must abate in proportion to make good the defect : but no reduction shall be made from specific legacies, if there is estate enough beside : but when the debts have swallowed up all the general legacies, then the specific legacies may be taken to pay them. If the legacies are paid, and debts are discovered beyond the amount of the remaining estate, then the legatees are liable to refund their proportion to pay such debts. But as the time in which debts can be exhibited, is limited by law, the executor

*g* Swinh. 522. *h* 3 Bac. Abr. 472, 474. *i* Ibid. 482.

executor may ascertain the fact before he pays the legacies, which will save any trouble of refunding. Legacies are said to be lapsed, contingent, or vested. A lapsed legacy is where the legatee dies before the testator, by which the legacy is lost, and sinks into the residuum of the estate. For a will is of no force, till the death of the testator. Of course a legacy, cannot vest till that time, if the legatee dies before the testator, the legacy cannot vest in him, but if he survives him ever so short a time, it will vest, and then descend to his heirs.

A contingent legacy is where the bequest depends upon the happening of some future thing, as a bequest to a person *if* or when he arrives to the age of twenty-one: if he dies before that time, the contingency on which the legacy was dependent, never happens, and of course the legacy is lost and is called a lapsed legacy.

A vested legacy is opposed to a contingent one, as if a bequest is made to a person to be paid *when* he arrives to the age of twenty-one. This is a vested legacy, the interest commences instantly on the death of the testator, tho the payment is to be made at some future time, and if the legatee survives the testator, tho he dies before he arrives to the age of twenty-one, yet his heirs are entitled to receive it at the time it would have been payable, had he lived. But it is said by the common law, if such legacy be made chargeable on the lands, it shall under such circumstances lapse for the benefit of the heir.

In case of a vested legacy, which is immediately due, and the payment of which is charged upon lands, or some property that gives immediate profit, then interest shall be paid from the death of the testator: but if it be chargeable on personal estate, then after the executor has had a reasonable time to pay it. And by the common law, the interest commences in a year after the testator's decease.

It is the duty of the executor to pay the legacies, unless some other person is ordered to do it by the will. By the common law of England, it is said, that the assent of the executor is necessary to perfect a legacy. But by our law, no such assent is neces-

sary, and as soon as a legacy becomes due, action of assumpsit will lie in favour of the legatee against the executor, for the recovery of it.

When all the debts and particular legacies are paid, then the surplus or remainder, goes to the residuary legatee, if there be any appointed by the will, but if there be none, then it is considered as intestate estate, and will be divided among the heirs of the testator, in the same manner as if no will had been made, and of this we are next to treat.

2. I proceed to consider the title to personal estate by descent, which comprehends the settlement of intestate estates.

By the English law, the title by descent is confined to real, and never applied to personal estate, because that goes into the hands of the administrator, and from him to the heirs by a legal distribution, different from the descent of real estates. But as in this state, personal estate is transmitted by descent from the ancestor to the heir, in the same manner in case he dies intestate, as real estate, there can be no impropriety, in the application of this term to personal estate, as it expresses the idea with more clearness and certainty, than any other term.

A person is said to die intestate, when he leaves no will, and in that case, as he has not signified his intention, respecting the disposition of his estate, the law to preserve the public peace, points out the mode of settling the estate, and the persons to whom it shall descend.

\* When a person dies intestate, the court of probate shall grant administration of his estate to his widow, or the next of kin, or both, and on their refusal or incapacity, to some other person, as the court shall judge fit : and on granting administration, sufficient bond with surety, shall be taken for a faithful discharge of the trust. When an administrator is appointed, his power and duty are the same with that of an executor, and he is bound to proceed to the settlement of the estate in the same manner. He must collect and inventory the estate, call in and pay out the debts. The only material

\* Statutes, 52.

material difference between these offices, seems to be this, that if an executor dies, his own executor succeeds to his office, and is the executor of the first testator : but the executor of an administrator, or the administrator of an executor, is not the representative of the first testator ; for the power of an executor is founded on the appointment of the testator, which evidences a confidence reposed in him. Such executor may therefore transmit his power to his executor. But the administrator being appointed by the court of probate, no such confidence can be presumed between him and the intestate. Therefore, whenever an administrator dies, before he has completely settled the estate, or an executor in the same circumstances, leaving no executor, it is necessary for the court of probate, to grant new letters of administration, on the goods not administered upon, by the former executor, or administrator : but where an executor dies, leaving an executor appointed by his will, he may by virtue of such appointment, proceed to complete the settlement of such unsettled estate.

When the administrator has collected and disposed of the personal estate of the intestate, if there be not a sufficiency to pay the debts, the court of probate may order a sale of lands, sufficient to pay the debts and incident charges of sale. When the debts are paid, the administrator must settle his account with the court of probate, and of the residuum of the personal estate, if any, a distribution must be made to the heirs of the intestate, unless such heirs being legally capable of acting, shall make a division among themselves, and present the same, in writing under their hands, and seals to the court, and acknowledge the same before such court or an assistant, or justice of the peace, which voluntary division, shall be recorded in the records of the court of probate, and be conclusive on the parties : but if no voluntary division be made, then the court of probate may appoint three sufficient freeholders, who, under oath, or either two of them, may make a distribution of the estate.

1 The personal estate of a man dying intestate, is to be distributed among his lineal heirs, precisely in the same manner, as real estate, and among his collateral heirs, in the same manner as real estate,

not



not received by descent, gift, or devise, from some parent, ancestor or kindred. But the statute makes this difference in respect of the right of the widow, to a portion of the real and personal estate of the intestate. She is entitled to one third of his real estate during life, and to one third of his personal estate forever, if he leaves any children ; but if he leaves none, then she is entitled to one half of his personal estate forever.

The statute law makes provision, that if any of the children, in the lifetime of the intestate, have any estate advanced to them by way of settlement, this shall be taken into consideration in the distribution, and all the children shall be made equal in their shares. If any have received their full shares, they are entitled to no more, and if any have received only part of their shares, they shall be made equal with the rest.

3. Of title by insolvency. When the estate is insolvent, the statute law has made the following provision to settle it.

■ That when the estate of any person deceased shall be insolvent, or insufficient to pay all the just debts, which the deceased owed, the same shall be sold, and the avails thereof be divided and distributed to and among all the creditors, in proportion to the sums to them respectively owing, so far as the estate will extend, saving that the debts due to this state, and for sickness, and necessary funeral charges of the deceased, are to be first paid.

And the executor or administrator, appointed to administer on any such insolvent estate, before payment be made to any person, (except as before excepted) shall represent the condition and circumstances thereof unto the judge of the probate of wills and granting of administrations, who shall nominate and appoint two or more fit and indifferent persons, to make a true and equal appraisement of such estate, and administer the oath by law prescribed to them for that purpose ; and shall also nominate and appoint two or more fit persons to be commissioners, with full power to receive and examine all the claims of the several creditors, and how they are made out and evidenced ; which commissioners shall be sworn according to law, and cause the times and places of their meetings for attending the creditors, in order for  
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the receiving and examining of their claims, to be made known and published, by setting up or posting notifications thereof in some public places in the town where such deceased person last dwelt; and also by advertising the same in one or more of the public news-papers in this state, and any further notice that the court of probate may order: And the said judge of probate shall allow six, ten or eighteen months, (as the circumstances of the estate may require) for the creditors to bring in their claims and prove their debts: At the end of which time limited as aforesaid, such commissioners shall make their report, and present a list of all claims to such judge, who shall order them a meet recompence out of the estate, for their care and labour in that affair.

And if on the report of the commissioners, such estate shall appear to be insolvent, the judge of probate to whom such report is made, shall order and set out to the widow of the deceased, (if any be) such necessary household goods as are mentioned in the law, entitled, "*An act for directing and regulating the levying and serving Executions,*" to be exempted from execution; which goods so set out, shall be her own property. And the judge shall order the widow's dower to be set out according to law. And the residue and remainder of said estate, both real and personal, (including that set out for the widow's dower, and under the incumbrance of her holding it for life) the judge of probate shall order and direct the executor or administrator, or executors or administrators, appointed to administer on such estate, to sell in such way and manner as to the judge shall appear safest and most for the benefit of the creditors. And such executors and administrators being so ordered and directed, shall have full power and authority, and they are hereby authorized and empowered to make sale thereof, and to make and execute legal and proper conveyances to the purchasers, which shall be good evidence in law for their holding the same accordingly. And such sales being made, the said executors and administrators shall render account to the judge of probate of the amount thereof, and the monies arising thereby. And the judge shall thereon order full payment to be made of the debts due to this state, and for sickness, necessary funeral expences  
and

and incident charges of settling and selling the estate. And the'rest due to be paid to the several creditors who have made out and evidenced their claims according to the directions of this act, as aforesaid, in proportion to the sums to them respectively owing.

*Provided always,* That notwithstanding the report of any such commissioners or allowances thereof made by the court of probate, it shall and may be lawful to, and for the executors and administrators aforesaid, to contest the proof of any debt at the common law.

And no process in law (except for debts due to this state, and for sickness and funeral charges) shall be admitted or allowed against the executors or administrators of any insolvent estate, so long as the same shall be depending as aforesaid.

And in case judgment shall be rendered against any executors and administrators of any insolvent estate, execution thereon shall be stayed until such estate can be settled according to this act : And the judgment creditor shall take no more than his proportion of the said insolvent estate with the other creditors ; and in case that be not paid on the settlement of the estate, such creditor shewing the same, and producing a certificate of his proportion, the court shall order execution on such judgment for no more than the proportion aforesaid.

And whatsoever creditor shall not make out his or her claims with such commissioners, before the full expiration of the time set and limited for that purpose, as aforesaid, such creditor shall forever after be debarred of his or her debt ; unless he or she can shew or find some other or further estate of the deceased, not before discovered and put into the inventory.

The executor or administrator, at any time in the course of the administration of the estate, when he discovers it to be insufficient to pay the debts, may represent it to be insolvent.

It has been adjudged, that a creditor to any amount cannot be a commissioner, that while the commissioners are acting within their power, and duty, no appeal can lie from the decree of the court of probate accepting of their report : and that their jurisdiction is final as it respects the creditors. It has also been adjudged

adjudged, that where commissioners exceeded their jurisdiction, as where they took into consideration matters arising after the decease of the intestate, that an appeal would lie : where the commissioners charged the claimant with the rents of land of the intestate, arising after his death, against a debt due antecedent to his death ; and where they allowed the administrator his expenses for supporting the children of the deceased, after his death. It has been adjudged, that an appeal will lie in favour of heirs and legatees from the decree of a court of probate, accepting the report of commissioners allowing a debt to the administrator ; because there is no person to contest such debt at law, as there is in the case of creditors, for the administrator, who alone can contest debts, will not contest his own debt.

Where there are mutual debts between the deceased, who died insolvent, and a creditor, they must be offsett : and this may be done by the commissioners. The executor or administrator cannot retain a note and collect the whole, so as to subject the creditor by book, to take his average, and in case they refuse to make the offsett, they may be compelled by a court of chancery : and on the question of allowing to apply on the note, a sum found due by commissioners, the administrator or executor, may contest the allowance of the debt. If they should put such debt in suit, the court before whom action is brought, may apply the sum allowed by the commissioners, in payment of the debt. If they collect such debt, a court of chancery will decree the payment of the sum which ought to have been offsett.

Action on note was brought against an executor, who pleaded the insolvency of the estate, to which the plaintiff replied the discovery of estate not inventoried, but on demurrer, the court held that a general action in such case is not maintainable ; but a special action adapted to the nature of the case.

The executor or administrator are not responsible for the rents and profits of the real estate of the deceased, before it was represented insolvent, because it goes by law to the heirs or devisees ; but they are accountable after the representation of insolvency.

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CHAP.

Stanford, &c. vs. Hyde, S. C. 1791. Fairwether vs. Curtice, S. C. 1793.  
 Hofner vs. Brattle, S. C. 1791. p Hofner vs. Merriam, S. C. 1792.  
 Rafe vs. Clark, & Wife, S. C. 1790. p Jones's Ex'r. vs. Leavenworth,  
 S. C. 1789. f Storer vs. Hinkley, S. C. 1790.

**I**NCORPOREAL property has already been defined to be an ideal right, issuing out of substantial corporeal things, either real or personal. In England there are several things which are classed under this description : but in this state, there is no right which can strictly be called incorporeal, but the right of ways : which is a privilege that one has to pass through the land of another. This right may be created in two ways, by prescription, and by grant. Grants may be express or implied. An express grant is where the proprietor of land by deed, conveys to another the right of passing over his land : or it may be grounded on a special permission, or licence, as where the owner of lands, grants to another the liberty to pass over them to go to mill or to market, or the like. In this case the right is confined to the grantee alone, and cannot be assigned. \* Grants are also implied by operation of law. If a man conveys to me a piece of land, which I cannot approach without passing through his other lands,—as a piece in the middle of his field, he at the same time, impliedly gives me a way to it, and I may cross his other land for that purpose : for it is a general maxim, that when the law giveth to one any thing, it giveth impliedly whatever is necessary to enjoy the same.

A right of way by prescription, is where the inhabitants of a town or village, or the owners or occupiers of a certain farm, have immemorially used to cross such a ground, for a particular purpose. This immemorial usage supposes an original grant, which creates a right of way. Such is the common law : but this country has been so lately settled, that the right of prescription, has hardly had time to operate.

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 APPENDIX.

# APPENDIX.

## CONTAINING FORMS AND PRECEDENTS.

### DEED.

**K**NOW Ye, that To all People to whom these Presents shall come Greeting.  
For the consideration of received to my full  
satisfaction, of Do give, grant, bargain, sell and confirm unto the  
said To have and to hold the above granted and bargained Premises, with the Appurtenances thereof, unto the said Heirs and Assigns forever, to and their own proper Use and Behoof. And also, the said Do for sel Heirs, Executors and Administrators, covenant with the said Heirs and Assigns, that at and until the enfeoffing of these Presents, well seized of the Premises as a good indefeasible Estate in Fee Simple; and have good Right to bargain and sell the same in Manner and Form as is above written; and that the same is free of all Incumbrances whatsoever. And furthermore the said do by these Presents bind sel Heirs, forever to Warrant and defend the above granted and bargained Premises to the said Heirs and Assigns, against all Claims and Demands whatsoever. In witness whereof have hereunto set Hand and Seal the Day of Anno Domini 179  
*Signed, sealed and delivered,*  
*in Presence of*

### WRIT of SUMMONS.

To the Sheriff of the county of H—his deputy, or to either of the Constables of the town of G—in said county Greeting. By authority of the State of Connecticut, you are hereby commanded to summon A. B. of said G—to appear before the Court of Common Pleas to be holden at H—on the Tuesday of then and there to answer unto C. D. of W—in a plea of which is to the damage of the Plaintiff the sum of lawful money, and to recover the same with cost, the Plaintiff brings this suit. Fail not, and make lawful service and return. Dated at Justice of Peace.

### WRIT of ATTACHMENT.

To the Sheriff of the county of H—his deputy, or to either of the constables of the town of G—in said county Greeting. By authority of the State of Connecticut, you are hereby commanded to attach the goods, or estate of A. B. in said G—to the value of lawful money, and for want thereof attach his body, and him have to appear before the Court of to be holden at on the day of then and there to answer unto C. D. of said G—in a plea of which is to the damage of the Plaintiff lawful money and to recover the same with cost, the Plaintiff brings this suit. Bonds for prosecution are given. Fail not, and make lawful service and return. Dated at

### DECLARATIONS.

#### ASSAULT and BATTERY.

In a plea of trespass, whereupon the plaintiff declares and says, that on or about the day of at the defendant with force and arms, did an assault make upon the body of the plaintiff, and did him beat and strike many blows whereby he was much wounded, and greatly injured, to his damage

Information **QUI TAM** for an **ASSAULT** and **BATTERY**; and **Warrant**.

To A. B. Esquire, Justice of the Peace for the county of H—comes C. D. of E—and complains and informs as well in the name of the State of Connecticut as in his own name, that F. G. of        on the day of        at        with force and arms did an assault make upon the body of the complainant, and did him beat, and strike many blows :—which doings of the said F. G. are against the peace, and contrary to the statute in such case provided, and to the damage of the complainant        lawful money. Dated at        C. D.

To the Sheriff &c. By authority of the State of Connecticut, you are hereby commanded forthwith to arrest the body of the above named F. G. of        and him bring before me the subscriber a justice of the peace for said county of        at        then and there to answer to the matters contained in the foregoing complaint of C. D. and be therein dealt with according to law. Bonds for prosecution are given. Fail not &c.

#### SLANDER.

In a plea of the case, whereupon the plaintiff declares and says, that from his youth to the present time, he has ever sustained a good character, and has never been guilty of the crime of theft, yet the defendant minding and intending to injure and destroy the character of the plaintiff, did on        at        maliciously, falsely, and openly, utter and publish in the hearing of sundry citizens of this State, the following false, and scandalous words of and concerning the plaintiff, (viz.) A. B. (meaning the plaintiff) is a thief and has stolen my horse (meaning the defendant's horse) and the plaintiff says that by reason of the defendant's speaking said words, he has been greatly injured in his good name and reputation, has been put to great trouble and expense and exposed to a criminal prosecution for the crime of theft, which is to his damage.

#### FALSE-IMPRISONMENT.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on        at        did with force and arms an assault make upon the body of the plaintiff, and him did beat and wound, and unlawfully imprison, and detained and confined him in prison for the space of twenty-four hours, and then and there did to him many other injuries, against the peace and to his damage.

#### MALICIOUS PROSECUTION.

In a plea of the case, whereupon the plaintiff declares and says, that he has from his youth to the present time, sustained a good character, and has never been guilty of perjury, of which the defendant was not ignorant, but contriving and maliciously intending to injure the character of the plaintiff, and bring him to public scandal and disgrace, did falsely and maliciously and without any reasonable, or probable cause whatever, on the day of        cause and procure the plaintiff to be informed against, and indicted for the crime of perjury, in the following manner (*recite the information or indictment with the words proceedings and the acquittal.*) And the plaintiff says that he was innocent of said crime of perjury charged in said information, yet the defendant well knowing the innocence of the plaintiff, but intending to injure him did falsely, and maliciously, and without any reasonable or probable cause whatever, cause, and procure the plaintiff to be informed against indicted and prosecuted for the crime of perjury as aforesaid, whereby the plaintiff has been greatly injured in his reputation, and has been put to great trouble and cost in his necessary defence. To his damage.

#### TRESPASS for **DEBAUCHING** the **PLAINTIFF'S DAUGHTER**.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on the        day of        and at divers other times since, did, with force and

and arms break and enter into the house of the plaintiff, and assaults make upon the body of A. B. the plaintiff's servant and daughter, under the age of twenty-one years; and the defendant did then and there seduce and debauch the said A. B. and carnally know her, and get her with child. By which the plaintiff lost the company and service of his said servant and child for a long time, viz. from and was put to great labor and trouble, and was forced to expend one hundred pound in maintaining and taking care of her lying in of said child, to his damage.

#### CASE for DEBAUCHING the PLAINTIFF'S DAUGHTER.

In a plea of trespass on the case, whereupon the plaintiff declares and says, that the defendant on the day of at contrary to the mind and will of the plaintiff did enter his house, and then and there seduced, debauched and carnally knew A. B. his daughter, who lived with the plaintiff and depended on him for her support: and the defendant begot the said A. B. with child; by which the plaintiff lost the comfort and service of his servant and child for a long time, viz. from and was put to great labor and trouble and expended one hundred pounds lawful money in maintaining and taking care of her, in her lying in of said child, and during her sickness, to his damage

#### DISSEISIN.

In a plea that to the plaintiff the defendant render the seisin and peaceable possession of a certain tract or parcel of land, lying in and bounded, bounded and described as follows containing about aerts of which tract or parcel of land, the plaintiff on or about the day of was well seized and possessed in his own right in fee, and so continued thereof possessed, until on or about the day of when the defendant without law or right, and contrary to the mind and will of the plaintiff thereto entered, and ejected the plaintiff therefrom, and ever since has, and still doth continue to despoil and hold the plaintiff out of the premises, taking the whole profits to himself, which is to the damage of the plaintiff the sum of wherefor the plaintiff brings this suit, and demands of the defendant, the surrender and quiet possession of the premises, together with said damages and cost of suit.

#### PARTITION.

In a plea that the defendant do appart, divide, and set out to the plaintiff one moiety, or half part of a certain tract of land, containing aerts, with the buildings thereon, lying in and bounded, bounded, and described as follows—Whereupon the plaintiff declares, and says, that he, and the defendant hold said tract of land together, and undivided, as tenants in common, in such manner and proportion, that it belongs to the plaintiff to have, and to hold in severalty one half part of the premises, and that he has a right to have his said proportion, and part set out by proper mores, and bounds, and to hold the same in severalty, but the defendant always has, and still does refuse to have the same set out, and apparted to the plaintiff, or to suffer the plaintiff to hold the same in severalty, tho often requested, and demanded—which is a damage to the plaintiff, the sum of for which, and for costs, and to obtain partition of said described premises, the plaintiff brings this suit.

#### TRESPASS.

In an action of trespass, whereupon the plaintiff declares, and says, that on the day of he was, and ever since has been, lawfully seized and possessed of a certain tract of land, lying in bounded, and bounded, and described as follows and the plaintiff says that on the day of the defendant did with force, and arms break, and enter into, and upon said described tract of land of the plaintiff, and did tread down, consume and destroy the herbage then and there growing, and did cut down one hundred trees, then, and there standing, and growing, to the damage of the plaintiff.

Where



Where the damage is done by cattle, the declaration must charge the defendant with breaking into, and entering upon the land of the plaintiff, and treading down, and destroying the grass, and herbage with his cattle, viz. horses, oxen, sheep, &c.

#### TRESPASS with respect to THINGS PERSONAL.

In an action of trespass, whereupon the plaintiff declares, and says, that on the day of he was the lawful owner of a certain bay horse, six years old, of the price and value of thirty pounds lawful money, and the defendant on said day, did with force, and arms, take and carry away said horse out of the possession of the plaintiff, to some place unknown, whereby the plaintiff has wholly lost the same, to his damage.

In an action of trespass, whereupon the plaintiff declares, and says, that the defendant, on the day of at did with force, and arms break into the dwelling house of the plaintiff, and did him assault, and beat, and unlawfully imprison for the space of twenty four hours, and did with force take, and carry away his goods, and chattels, viz. one thousand hats of the price, and value of one thousand dollars, &c. whereby the plaintiff lost the same, to his damage.

#### TROVER.

In a plea of the case, whereupon the plaintiff declares, and says, that on the day of he was possessed of ten yards of broad-cloth, of the value of ten pounds lawful money, which was his own proper estate, and being so thereof possessed, he afterwards on the day of lost said broad-cloth, out of his hands, and possession, which afterwards on the day of came into the hands and possession of the defendant, by finding: and the plaintiff says, that the defendant well knew that the said cloth belonged to the plaintiff, but contriving, and intending to deceive, and defraud him, he the defendant has at all times neglected and refused to deliver said cloth to the plaintiff, who often requested, particularly on the day of and the defendant afterwards on the day of converted, and disposed of the same, to his own use, to the damage of the plaintiff.

#### DEBT.

In a plea that to the plaintiff, the defendant render the sum of lawful money which he justly owes, and unjustly detains, whereupon the plaintiff declares and says, that the defendant in and by a certain writing, or bond obligatory, under his hand, and seal, by him well executed dated the day of acknowledged himself holden, and firmly bound, and obliged unto the plaintiff, in the sum of to be paid in a reasonable time, when there-to requested, as by said writing, or bond obligatory ready in court to be shewn appears: which debt the defendant has never paid, tho often requested and demanded, and the reasonable time has accrued—to the damage of the plaintiff.

#### COVENANT.

In a plea of covenant broken, whereupon the plaintiff declares, and says, that on the day of for the consideration of he purchased of the defendant a certain tract of land, lying described as follows: and that the defendant on the day aforesaid, made, executed, and delivered to the plaintiff a deed of conveyance of said lands, in which among other things, the defendant covenanted with the plaintiff, that at, and until the enfeoffing of said deed, he the defendant was well seized of the premises, as a good indefeasible estate in fee—as by said deed ready in court to be shewn, appears. Now the plaintiff says, that at the time of executing said deed, the defendant was not well seized of the premises, as an estate in fee, and that

that he was not the owner of said land, but the same belonged to C. D. and thereupon the plaintiff says that the defendant his said covenant not regarding has wholly failed to keep, and perform the same, tho often requested, but has broken the same, and refused, and still does refuse to keep the same, to the damage of the plaintiff.

#### ACCOUNT.

In a plea that to the plaintiff, the defendant render his reasonable account, during the time in which he was the plaintiff's bailiff and receiver, whereupon the plaintiff declares and says, that from the day of till the day of the defendant was the bailiff and receiver of the plaintiff, and did during that time, receive of the plaintiff divers goods and merchandize, viz. to sell and dispose of, to merchandize with, and make profit thereof, and to render his reasonable account thereof to the plaintiff when he should afterwards be thereto requested; yet the plaintiff says, that the defendant has hitherto refused and still does refuse to render his reasonable account thereof, tho often requested, which is to the damage of the plaintiff the sum of and to recover the same, and that the defendant render his reasonable account, during the time he was bailiff and receiver as aforesaid, the plaintiff brings this suit.

#### ASSUMPSIT.

In a plea of the case, whereupon the plaintiff declares and says that on the day of the defendant was justly indebted to the plaintiff, in the sum of one hundred pounds lawful money, for money he the defendant before that time had received, to the use of the plaintiff, and being so indebted, the defendant in consideration thereof, afterwards on the day of assumed upon himself, and well and faithfully promised the plaintiff, to pay to him said sum of one hundred pounds lawful money, in a reasonable time then afterwards, when thereto requested; nevertheless the plaintiff says, that the defendant his said promise not regarding, hath never performed the same tho often requested, and tho a reasonable time hath long since accrued, to the damage.

Whereupon the plaintiff declares and says that on the day of the defendant was justly indebted to the plaintiff in the sum of one hundred pounds lawful money for money before that time laid out and expended for the defendant, at his special instance and request— or lent and advanced for him at his special instance and request— or for goods sold and delivered, *(as the case may be)* and being so indebted, &c.

In a plea of the case, whereupon the plaintiff declares and says that on the day of the plaintiff and defendant came to a settlement and adjustments of accounts before that time subsisting between them, and there was found due from the defendant, on the account so stated, to the plaintiff, a balance of ten pounds lawful money, and the defendant being in arrear to the plaintiff said sum of ten pounds lawful money, he did on the day aforesaid, in consideration thereof assume, &c.

In a plea of the case whereupon the plaintiff declares and says, that on the day of he was the lawful proprietor of a certain tract of land, lying containing acres and is described as follows and the plaintiff says that on the day of at the special instance and request of the defendant, he permitted the defendant to enter into possession of the premises, and the defendant held, and occupied the premises for the space of one year afterwards, taking the whole profits to himself; and the defendant in consideration thereof, afterwards, on the day of assumed on himself, and well and faithfully promised the plaintiff to pay to him so much money as he therefor reasonably deserved to have, in a reasonable time when thereto requested, and the plaintiff says that he therefor, reasonably deserved to have one hundred pounds lawful money, of which the defendant had notice, yet the plaintiff says that the defendant his said promise not regarding hath never performed the same &c.

## BOOK DEBT.

In a plea that to the plaintiff the defendant tender the sum of lawful money, which to the plaintiff the defendant justly owes by book, to balance book accounts as by the plaintiff's book ready in court to be produced appears, which debt the defendant hath never paid tho often requested, &c.

## SCIRE FACIAS.

To the sheriff, &c. Whereas, A. B. of brought his action of debt, to the court of common pleas, holden at against C. D. of an absent and absconding debtor, by writ, bearing date day of demanding ten pounds lawful money, which writ was duly served on said C. D. and also a true and attested copy thereof, with the officer's doings thereon, was left with E. F. of attorney and debtor to said C. D. more than fourteen days before the sitting of said court, to which said writ, being duly served, was returned, and by legal removes, said action came to the court of common pleas, holden at on the day of when and where, the plaintiff recovered judgment against the said C. D. for the sum of and cost of suit and thereupon took out execution, for the sums aforesaid, with one shilling more for said execution, in due form of law, which execution was dated, and signed by clerk of said court, and directed to the sheriff of the county of to serve and return, which execution was put into the hands of sheriff of said county, who on the day of made return thereof with his indorsement thereon, that he had made diligent search and enquiry after the person and estate of C. D. and could find neither, and that on the day of he made demand of E. F. attorney and debtor to said C. D. of the sums contained in said execution, and that he refused to pay the same, or shew any estate of the said C. D. whereupon said execution could be levied. Fees As by the files and records of said court and said execution with the indorsement thereon may appear. And now the plaintiff says that said E. F. at the time the copy of said writ was left with him, was justly indebted to said C. D. in a greater sum than the amount of said judgment and execution, with the officers fees thereon: yet the defendant would not expose or discover any estate whereon said execution might be levied, nor pay the same or any part thereof, whereby the defendant has become liable in law to pay the same, out of his own estate, as his own proper debt: and the plaintiff says, that said judgment has never been reversed, nor has the same and the officers fees ever been paid, but are now due.

These are therefore by the authority of the State of Connecticut, to require you to make the said E. F. to know, that he appear before the court of common pleas, to be holden at on then and there to shew reasons if any he have, why judgment should not be had and rendered in favour of the plaintiff against the said E. F. for the amount of said judgment and execution, and officers fees, and the costs of this suit, as his own proper debt, to be paid out of his estate, and that execution should be issued against him accordingly. Fail not &c.

## ACTION on STATUTE.

In an action bought on a certain statute law of this state, entitled an act for detecting and punishing trespasses in divers cases, and directing proceedings therein: whereupon the plaintiff declares and says, that by said statute it is enacted (*recite the first paragraph*) Now the plaintiff says, that on the day of he was well seized and possessed of a certain tract or piece of land lying in and described as follows, and that the defendant on the day of did with force and arms, break into and enter upon said tract of land, and did then and there cut down ten trees of a greater dimension than one foot diameter, and the same carry away to some place unknown, and the plaintiff says that the defendant by force of said statute, has forfeited and become liable to pay to the plaintiff ten shillings lawful money for each of said trees, and three times the value of said trees, and the plaintiff says that said trees were well worth three pounds lawful money, and that the defend-

ant has forfeited and become liable to pay to the plaintiff the sum of fourteen pounds lawful money, being ten shillings for each tree, and three times the value thereof, and that a right of action by force of said statute has accrued to the plaintiff to recover the same of the defendant with cost, and to recover the same with costs the plaintiff brings this suit.

Then and there to answer unto A. B. of                      In an action brought on a certain statute law of this state, entitled an act concerning leather, and for regulating the several artificers concerned in working, or making up the same, who sues, and brings this action, as well in the name of the state of Connecticut, as in his own name, whereupon the plaintiff declares, and says, that in and by said statute among other things is enacted. [*recite second paragraph*] Now the plaintiff says, that the defendant disregarding the penalties of said statute, did on the                      day of                      in                      erect, set up, and make tan vats to tan in, and did carry on the trade, and mystery of tanning leather, and has ever since kept up said vats, and used said trade, and the plaintiff says, that the defendant has never applied to the court of common pleas in said county, and has never obtained any licence to set up, and manage the trade of tanning leather, which doings of the defendant are contrary to said statute, and the plaintiff says that he the defendant has forfeited the sum of twenty pounds lawful money, one moiety to the treasury of the county aforesaid, and the other moiety to the plaintiff, and that a right of action by force of said statute has accrued to him, to recover the same, for the uses aforesaid, and to recover the same with just cost, the plaintiff brings this suit.

#### ACTION on ORDER, or INLAND BILL, refused to be ACCEPTED.

In a plea of the case, whereupon the plaintiff declares and says, that on the day of                      the defendant was justly indebted to the plaintiff by book in the sum of ten pounds lawful money, and in consideration and satisfaction thereof the defendant made, executed and delivered to the plaintiff a certain writing or order in the words following. To A. B. for value received, pay C. D. ten pounds lawful money and charge to account of E. F. As by said order or writing ready in court to be produced appears, which order the plaintiff accepted in discharge of said debt, and on the day of                      offered and presented the same to said A. B. for acceptance and payment, and the said A. B. then refused to accept and pay the same of all which, the defendant afterwards on the day of                      had notice: and thereupon the plaintiff says, that the defendant by reason of the premises, became justly indebted to him in the sum of ten pounds lawful money, and being so indebted, he did in consideration thereof assume upon himself, and well and faithfully promise the plaintiff, to pay to him said sum of ten pounds lawful money, in a reasonable time when requested.

#### WARRANTY.

In a plea of the case whereupon the plaintiff declares and says, that on the day of                      he purchased of the defendant, a certain horse and paid him therefor, the valuable consideration of thirty pounds lawful money, and the plaintiff says, that at the time of the sale and delivery of said horse, the defendant did affirm, declare, and warrant to the plaintiff, that the same was sound, wind and limb, and free from any defect or disease whatever, and the plaintiff says that at the time of said sale, delivery and warranty of said horse, the same was disordered and defective, and for a long time before, and then had a certain incurable disease, called—whereby said horse was rendered of no value, and the plaintiff has wholly lost the same: and the plaintiff says that the defendant has not kept his said warranty, but has broken the same, to his damage, &c.

#### FRAUD.

In a plea of the case, whereupon the plaintiff declares and says, that on the day of                      he purchased of the defendant a certain horse—and paid him therefor the valuable consideration of thirty pounds lawful money, and the

plaintiff says, that he purchased said horse as, and for a sound horse, and that the defendant at the time of said sale and delivery, did affirm and declare to the plaintiff, that said horse, was sound wind and limb, and free from any defect or disease whatever. And the plaintiff further says, that at the time of said sale and delivery, said horse was unsound, and then and for a long time before, had an incurable disease, called—which was then well known to the defendant, but wholly unknown to the plaintiff: and that said disease has rendered said horse of no value, and that the plaintiff has wholly lost the same, to his damage, &c.

#### AUDITA QUERELA.

To the honorable—Esquire, judge of the court of common pleas, in the county of A. B. of complaint makes, and gives your honour to understand, that B. D. of brought his action on the case against the complainant, before the court of common pleas, holden at on the day of demanding lawful money damages. At which court, the said C. D. recovered judgment against the complainant, for the sum of debt, and cost, and took out execution therefor, and on the day of the complainant paid to the said C. D. the full sum of said judgment and execution, and all cost; nevertheless the said C. D. immediately put said execution into the hands of the sheriff of said county, who now holds the same and threatens to levy the same upon the person or estate of the complainant: and the complainant has no day in court to plead the matters aforesaid, and is grievously injured in the premises, whereupon he prays that said execution may be stayed, and that the said C. D. may be summoned to appear before the next county court, to be holden at then and there to shew reason, if any he have, why he should not be stayed from proceeding any further with said execution, and that all proceedings on the same may be stayed till the same be determined. Dated, &c.

To the sheriff, &c. By authority of the state of Connecticut, you are hereby required to cause the said C. D. in the foregoing complaint, to know that he proceed no further with said execution in said complaint mentioned, but that he stay the same until the matter mentioned in said complaint shall be heard by said county court, according to the request of said complainant, and you are to summon the said C. D. to appear before the county court to be holden at then and there to answer to the matters contained in the said complaint, and to do and suffer what upon a hearing of said cause shall be adjudged by said court in the premises. Fail not &c.

#### WRIT of ERROR.

To appear before the honorable superior court to be holden then and there to hear read, the process, record and judgment of the court of common pleas holden at in an action wherein the said was plaintiff, and was defendant, and the errors therein assigned, and to do and suffer what by said superior court shall be enjoined in said cause. Whereupon the plaintiff in error declares and says, that the said brought forward to the court of common pleas, holden his action in the following manner, (*recite the whole process and proceedings in the action*) as by the files and records of said court of common pleas ready in court to be produced, fully appears. Now the plaintiff in error complains and says, that said court of common pleas in proceeding to, and rendering said final judgment, manifestly erred and mistook the law, and for cause of error especially assigns whereupon the plaintiff prays, that said erroneous judgment may be reversed and set aside, and he be restored to all that he has lost thereby, which is not less than lawful money, and to recover said damages and reverse said judgment, the plaintiff brings this suit. Fail not &c.

#### P L E A D I N G S.

##### CASE.

In a plea of the case whereupon the plaintiff declares and says, that the defendant, in and by a certain writing or note, under his hand, by him well executed

executed, dated the      day of      promised the plaintiff for value received to pay to him the sum of ten pounds lawful money, on demand with interest, as by said writing or note ready in court to be produced appears. And the plaintiff says that the defendant his promise aforesaid not regarding, hath never performed the same, tho often requested &c.

John Doe.

PLEA in BAR.

vs.

Richard Roe.

Court of common pleas,—W.—county, Dec. term—

Action on case—

And now the defendant defends, pleads and says, that the plaintiff of having and maintaining his action, ought to be barred, because, he says tho true it is that he executed the note on which, &c. yet he further says, that on the day of      he did offer and tender to the plaintiff, the sum of ten pounds lawful money, which was the full sum due on said note, in full payment thereof, which the plaintiff then refused to accept and receive, and still does refuse to receive the same, and the defendant says that he has always stood ready to pay said sum to the plaintiff, and yet is ready, and now offers and tenders the same in court; which the defendant is ready to prove, and thereof prays judgment.

#### REPLICATION.

The plaintiff replies to the plea in bar of the defendant, and says, that he ought not to be barred, any thing therein contained, notwithstanding, because he says, that tho true it is, that the defendant did, on said day offer and tender to the plaintiff said sum of ten pounds, in full payment of the note, on which, &c. and that the plaintiff refused to accept, and receive the same, yet he further says, that afterwards, on the day of      he the plaintiff did make demand of the defendant of said sum of ten pounds due by the note, on which, &c. and tendered as aforesaid, which the defendant then refused and neglected to pay, which the plaintiff is ready to verify, and thereof prays judgment.

#### REJOINDER.

The defendant rejoins to the reply of the plaintiff, and says he ought not to be barred, because he says, tho true it is, that the plaintiff on said day of      made demand of the sum due by the note on which &c. and tendered as aforesaid, yet he further says, that he did on said      day of      offer and tender to the plaintiff, said sum of ten pounds tendered as aforesaid, which he is ready to prove, without that, that the defendant then refused and neglected to pay to the plaintiff, said sum of ten pounds lawful money, due by the note on which &c. and tendered as aforesaid, in manner and form as the plaintiff in his reply hath alledged, and thereof prays judgment.

#### SURREJOINDER.

The plaintiff surrejoins to the rejoinder of the defendant, and says, he ought not to be barred, because he says, that on the day of      he did make demand of the defendant, of the sum due by note on which &c. and tendered as aforesaid, which the defendant then refused and neglected to pay, in manner and form as the plaintiff in his reply has alledged, and thereof puts himself on the country.

#### REBUTTER.

And the plaintiff likewise.

#### JUDGMENT.

At a court of common pleas holden at—

John Doe, of ——— Plaintiff.

Richard Doe, of ——— Defendant.

In a plea of the case on note, demanding      lawful money damages, with cost of suit, as per writ on file dated      This action was brought to      and by legal removes, comes to this term. Now the parties appeared, and are at issue, as on file. The case with the evidences, being committed to the jury, they brought in the following verdict, viz. “ In this case the jury find,

M m m 2

that

" that the plaintiff on the      day of      did make demand of the defendant  
 " of the sum due by the note on which &c. and tendered as aforesaid, which  
 " the defendant neglected and refused to pay, in manner and form as the  
 " plaintiff in his reply and rejoinder has alleged, and therefore find for the  
 " plaintiff to recover of the defendant      damages together with his cost."  
 This court accept the verdict of the jury, and thereupon consider that the  
 plaintiff recover of the defendant      lawful money damages, and his cost of  
 suit taxed at

### INFORMATION by GRANDJURORS.

#### BREACH of PEACE.

To A. B. justice of the peace for the county of C. comes E. F. of G. a  
 grandjuror in said town of G—and to your worship on oath complains and  
 informs, that H. L. of said G—did at      on or about      with force and arms,  
 an assault make upon the body of E. L. of      and did him, beat and strike  
 many blows, by which he was greatly hurt and wounded, which doings of the  
 said H. L. are against the peace, and contrary to the statute, in such case  
 made and provided.      E. F. Grandjuror.

#### WARRANT.

To the sheriff, &c. By authority of the State of Connecticut you are hereby  
 commanded forthwith to arrest the body of H. L. of      and him bring be-  
 fore me the subscriber a justice of the peace for the county of      at then  
 and there to answer unto the matters contained in the foregoing complaint  
 of E. F. grandjuror, and thereon be dealt with according to law. Fail not  
 &c.

#### THEFT.

—Complains and informs, that A. B. of      did in      on the      day of  
 feloniously take, steal, and carry away a certain (*describe the thing stolen*) of  
 the price and value of      the proper estate of E. F. which doings of the  
 said A. B. are against the peace and contrary to the statute in such case made  
 and provided.

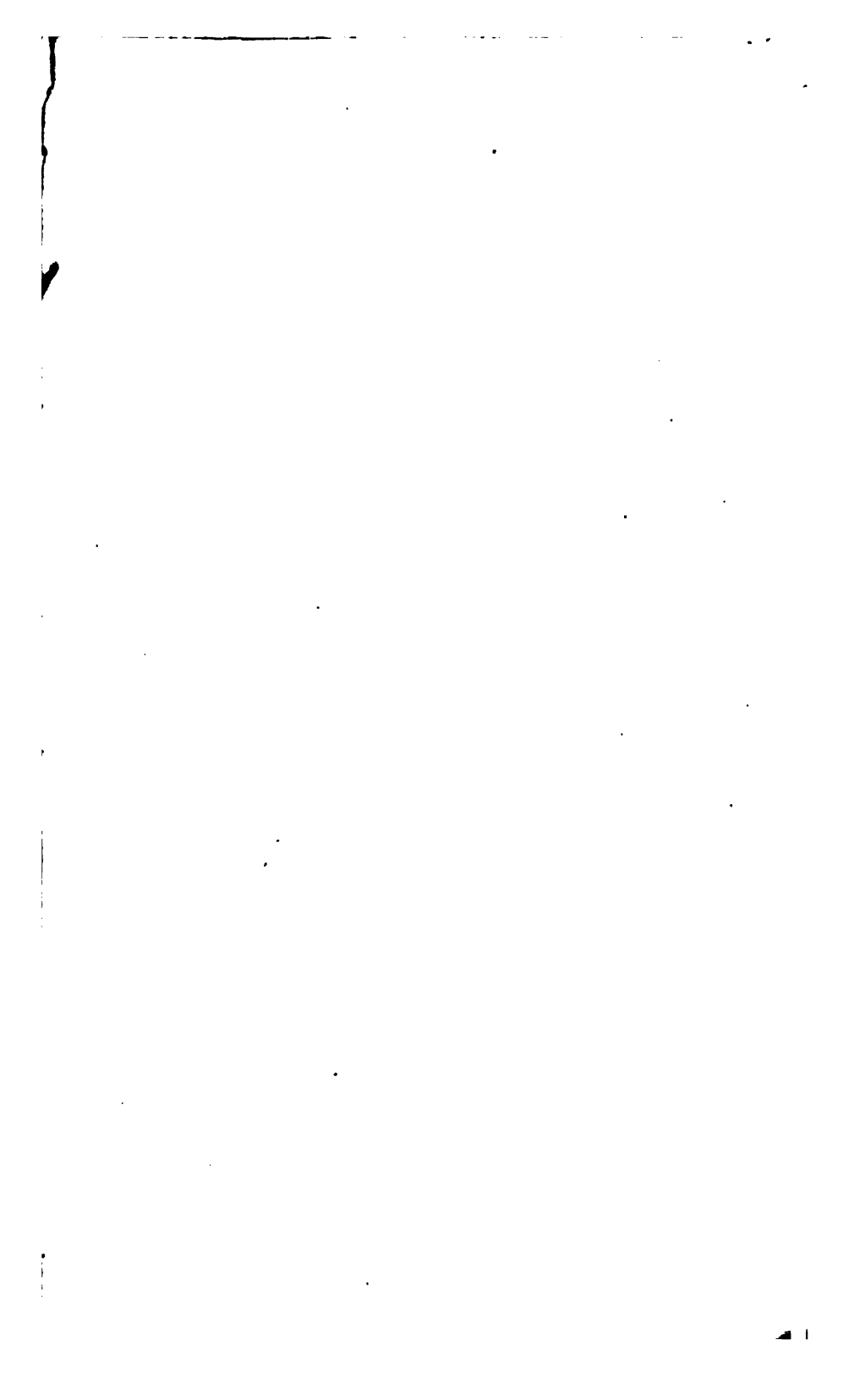
#### PETITION in EQUITY.

To the honorable superior court of the State of Connecticut, to be holden  
 at      The petition of A. B. of C—humbly sheweth (*state all the material cir-*  
*cumstances of the claims or matters in dispute.*) and your petitioner says, that he  
 is wholly without remedy at law, and must forever lose said just debt, or claim,  
 unless relieved by the interposition of your honours, as a court of equity;  
 your petitioner therefore prays your honours to take his case into considera-  
 tion, and enquire into the truth of the aforesaid facts, either by yourselves, or  
 by a committee, and on their being found true, to order and decree (*state*  
*the specific relief desired,*) or that your honors would in some other way, grant  
 such relief, as to your honors shall seem just and reasonable, and your petiti-  
 oner as in duty bound shall ever pray. Dated, &c.

#### SUMMONS.

To the sheriff, &c. By authority of the State of Connecticut, you are hereby  
 commanded to summon and give notice to D. E. of F—to appear (if he see  
 cause) before the superior court to be holden at      then and there to shew rea-  
 sons (if any he have) why the prayer of the foregoing petition of A. B.  
 of C—should not be granted. Fail not &c.

E. G. A. A.





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**PETER S. DUPONCEAU.**

**A**

**S Y S T E M**

**OF THE**

**L A W S**

**OF THE  
STATE OF CONNECTICUT.**



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**By ZEPHANIAH SWIFT.**

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**VOLUME II.**

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**WINDHAM: PRINTED BY JOHN BYRNE, FOR THE AUTHOR.**

**1796.**



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A SYSTEM



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# A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT.

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## BOOK FOURTH.

### Of private wrongs, and the modes of redress.

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#### CHAPTER FIRST.

##### OF REDRESS OF PRIVATE WRONGS, BY OPERATION OF LAW AND ACT OF THE PARTIES.

**I**N the foregoing Books we have treated at large of the several rights of individuals. This has laid a proper foundation for the discussion of wrongs or injuries : which are defined to be a violation or deprivation of such rights. It is however unnecessary to go into a minute detail of the several injuries by which the rights of mankind are affected ; because in treating of rights, it became necessary in some measure to point out the injuries : and in delineating the modes of redressing wrongs, we shall have occasion to enter into as minute an explication of them, as can be necessary. It would be impossible to make a particular description of every wrong that a person might sustain ; we must therefore establish general principles, and then detail the remedies for injuries that come within such description.

Mankind are entitled to restitution for wrongs, not only by suit at law, but in some cases they may obtain it without suit. Of this I treat in the first place, and then proceed to remedies by actions or suits ; which is the great object of legal establishments.

- I. The operation of law in two instances vests a person with  
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the power of obtaining his right. These are called *retainer* and *remitter*. *a* Retainer, is where a person makes his creditor his executor, or where the creditor obtains letters of administration : the law enables the executor or administrator in such cases, to retain a sufficiency of the estate of the deceased in their hands to pay their debts ; because they cannot sue themselves, and must be without remedy unless they may retain : *b* but executors in their own wrong cannot retain. *c* Remitter, is where a person having the true right to lands is out of possession, and has the freehold cast upon him by some subsequent and defective title ; he is then by operation of law remitted to his first and certain title, and may by virtue of it maintain possession against any other person, notwithstanding the defect in the title by which he came last into possession. This rule results from the consideration, that such person can have no legal remedy to confirm or acquire his former good title, and therefore he ought to be remitted to it without suit.

II. The parties, by the intervention of their own acts, may in a variety of instances do themselves justice.

1. Self-defence, or self-preservation, is properly deemed the primary law of nature. Mankind do not therefore relinquish it upon entering into a state of society, but reserve to themselves the power of exercising it upon all necessary occasions. *a* This right extends not only to one's self, but is mutual between all persons that stand in the relation of husband and wife, parent and child, master and servant. If any man be forcibly attacked by another in his person or property, or if any of his relations within the above description be thus attacked, he has a right to resist, repel, and defend against such forcible injury, by force, and the aggressor must be responsible for all the consequences. If a breach of the peace ensue, or if the aggressor be wounded, he alone is punishable for the crime, and has no remedy for the battery. If therefore a man will begin the affray, tho he afterwards be severely beaten, he may be prosecuted, and punished for a breach of the peace, and the person assaulted has his action against him, and the subsequent beating by the person assaulted, can only go in mitigation

*a* Brownl. 75. *b* 5 Co. 30. *c* Co. Lit. 347. *d* 3 Black. Com. 3.  
2 Rol. Abr. 59. 1 Hawk. P. C. 131.

tion of damages. But in these cases it must be observed as a general rule, that the resistance must not exceed the proper bounds of defence, by repelling the attack, and putting it out of the power of the assailant to do any further injury. For this purpose not only a breach of the peace, but homicide itself is justifiable. If however, a person exceeds the bounds of defence, he then becomes the aggressor, and can no longer justify himself, but is answerable for his conduct.

2. "Recaption, or reprisal, is where one person takes away the goods of another, or wrongfully detains his wife, children or servant; then such owner, husband, parent or master, may retake them wherever he can find them, provided it be done in a peaceable manner, without committing a riot, or breaking the peace. For if property cannot be reclaimed in a quiet manner, the law drives the party to his remedy by action, as the peace and good order of society is of the highest importance, and can never be maintained if the law admits of force and violence in the recaption of property; but in all such cases adequate remedies are furnished by law, which renders it unnecessary to have recourse to such dangerous and tumultuous expedients. If a horse be taken from the owner, if he can find him in a common, fair, or public inn, he may retake him: but he has no right to break open a private stable, or enter upon the ground of a third person, to take him, unless he were stolen. But in such cases where the trespasser is a person of no property, and the owner is in danger of losing his horse, or whatever property it may be, if he does not retake it, he would for the recaption, by entering another's stable, or upon another's land, be liable to the smallest damages only.

3. A right of entry on lands, belongs to the proprietor in fee, so long as his right of action continues. In England there is much abstruse learning on this subject; but we have no occasion to look into it, because our right of entry is dependent on a single principle. Whoever is the proprietor of lands, and can maintain action for the recovery of the possession, may make entry thereon. For as a title is acquired by the possession of fifteen years, the necessity of the English rules concerning entries, is superseded, and it is proper to permit a man to enter on lands so long as he has a

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right

right to bring his action. All entries must be made in a peaceable quiet manner, without tumults, riots, or breaches of the peace; for if the entry be forcible, the person turned out of possession, may regain it by virtue of the statute concerning forcible entry and detainer, tho he has no title to the lands.

4. The abatement or removal of nuisances, is a right of the person injured, without the intervention of law. A nuisance may be defined to be something that unlawfully annoys, or does damage to another, and may be abated, taken away or removed, by the person who sustains any damage thereby, provided he does it in a peaceable manner, without committing a riot or breach of the peace.

5. Impounding of creatures, taken damage feasant, or doing damage upon one's land, is allowed by law to the party injured. By the English law distress of personal property for the non-payment of rent, is admitted in favour of the landlord against the tenant: but here it is admitted only where creatures are found doing damage, or trespassing upon another's land. The mode of proceeding is pointed out by statute.

6 All horses, cattle, sheep, swine and other creatures, which break into a man's inclosure, may be taken and impounded. It is the duty of the selectmen of every town, to provide sufficient pounds, and on failure they incur a penalty of ten shillings per month, half to the informer, and half to the county treasury. But towns may grant liberty to any parish or part of a town to keep a pound, and the selectmen shall not be liable for their defects. Towns must annually appoint key-keepers for pounds, whose duty it is to receive and secure creatures brought to the pounds—take proper care of them, and provide them food. The person impounding any creatures, shall as soon as may be, give notice to the owners, if known, upon penalty of forfeiting one shilling per head for such creatures, during every day they continue in the pound, with the expence of supporting them. If the owner be not known then the impounder must give notice to one of the constables of the town, who shall cry such creatures with their natural and artificial marks, by posting up the same in the town where they are impounded,

impounded, and in the two next neighbouring towns from whence it is most likely they came. If no owner appears where the creatures are sheep or swine, in eight days, and horses or cattle in twenty days after posted, then the constable may sell at vendue so many of the creatures as shall be sufficient to satisfy all damages and costs. And the natural and artificial marks of the creatures so fold, shall be entered in the town clerk's office, with an account of the charges, the price of the creatures, and the overplus (if any) remaining, after the town clerk is paid for the entry. The remainder shall be delivered to the town-treasurer, to be kept for the owner ; but if none appear within a year, it shall belong to the town treasury.

The fence of the enclosure from whence such creatures are taken and impounded, must be found sufficient by two sworn fence-viewers, before any sale be made as aforesaid. If the owner come within twenty days, he is entitled to his horses and cattle, upon paying all damages and costs.

III. The instances already mentioned, respect the act of one party only, we shall next consider two cases where the act and covenant of both parties are necessary.

1. *a* Accord, is an agreement between two parties to give, and accept something in satisfaction for an injury done by one to the other, or for a debt due from one to the other. An accord, and agreement when executed, may be pleaded in bar to an action for the same thing. For as a person can by law recover nothing but damages for a personal injury, as an equivalent, if he accepts such equivalent by a voluntary agreement, the cause of complaint is removed, and an accord with satisfaction, or an accord executed, are good pleas : but an accord executory is no bar to an action, for where a future satisfaction is promised, the injury continues till the satisfaction be made ; and therefore such an agreement does not remove the injury, or discharge the demand.

It is held that an award to be good, must be advantageous to the party, otherwise it is no satisfaction. On this principle it is said that where an action is brought for taking one's cattle, it is not a good plea to say that there was an accord to take them again, because there is no satisfaction. An accord that each shall be quit of certain actions, is no good plea on the same principle. So an agreement

agreement to offsett one trespass against another, has been held to be ill. The rule of law seems therefore to be that there shall not only be an accord, but something given or done by way of satisfaction, in order to discharge the right of action.

In all cases where one person has a challenge upon another for a trespass, he may agree to accept of certain amends in satisfaction thereof, and when the trespasser has executed the agreement on his part, he is exonerated from the demand. In all cases of debt, the creditor may agree to accept of something in lieu of the article specified, and the performance by the debtor may be pleaded in bar to the action. An accord to accept a lesser sum in satisfaction of a greater, and the actual acceptance is a good plea in bar to an action.

\* The best and safest way of pleading accords is by way of satisfaction; for if it be pleaded by way of accord, the precise execution in every part must be pleaded; and if there be a failure in any part, the plea is insufficient; but if it be pleaded by way of satisfaction, it is necessary only to plead that he paid the sum, and performed the thing agreed in satisfaction of the demand, which the plaintiff received. But where there is an accord, and agreement to accept a certain thing in satisfaction of a debt or trespass, and the defendant performs on his part, and the plaintiff refuses to accept it in satisfaction, it then becomes necessary for the defendant to plead the accord and agreement, expressly, and a precise execution on his part, in order to avoid the demand: and if he can shew an execution of the accord on his part, he can avoid the action, tho the plaintiff refuses to accept it. Thus if I have a demand upon a person for damages arising from a trespass, or for a debt, and agree to accept a horse, or a certain sum of money within a certain time for the payment thereof, if the person tender me the thing agreed on by the time limited, it is a good bar to an action, tho I refuse to accept it; but then it is necessary to shew a precise performance of the accord on his part.

In England they make a distinction between written and unwritten contracts, and lay it down as a rule that a contract in writing can only be discharged by writing, and that a verbal accord is no good plea to a written obligation. But with us we have exploded this distinction, and a verbal accord executed, or with satisfaction,

faction, would be a good plea to bar an action grounded on a written obligation.

• But an executory agreement by parol, not executed, is no bar to a written contract.

• In all personal actions where damages are demanded as amends for some wrong, an accord executed, or with satisfaction, is a good plea, • but an accord with satisfaction is no good plea to a real action; because a title to a freehold cannot be barred by a collateral satisfaction.

7. Arbitration is an amicable and neighbourly mode of settling personal controversies, between individuals, by submission to certain persons called arbitrators, and elected by the parties themselves. It may with propriety be denominated a court created, constituted, and appointed by the parties, and the judges derive all their power and authority from the instructions which are given them. This mode of adjusting disputes among mankind is so fair, liberal and friendly, that it is highly favoured by the law, and as the parties elect their own judges, courts are exceeding cautious about setting aside their awards. Arbitrators are so called from their possessing an arbitrary power, for while they keep within the limits of their instructions, their determinations are definitive, and subject to no appeal: nor can their sentences be reviewed or reconsidered by any court of law or equity. They are not tied down to the same strictness, formality and precision as courts of law. While they have greater latitude in the mode of proceeding than courts of law, they have ampler powers to do complete and perfect justice between the parties in the decision of the matters in dispute. This freedom from legal formality and nicety, and this extensive latitude in the mode of proceeding, furnish arbitrators with much better advantages to adjust and settle long, intricate, and embarrassed controversies, than courts of law can possibly have. Where there are a variety of controversies, arbitrators can comprehend them all under one submission, and settle them all by one decision. They can make such offsets and discounts of mutual demands, and such allowances respecting cost, as are consonant to the principles of equity. But if the parties are driven to their remedies at law, an action must be brought for each matter of dispute, which must have distinct trials and determinations.

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The legislature has so far favoured this mode of finishing controversies, that a statute has been made enabling parties to make their submission a rule of court, and then on the award of the arbitrators execution may be granted, and so in case of an action pending before the court, the parties may in like manner make a submission. The statute law enacts, that all merchants and others desiring to end any controversy by arbitration, for which they have no other remedy but a personal action, or suit in equity, may agree that their submission of the suit to the award, or umpirage of any persons, shall be made a rule of any of the superior or county courts, which the parties shall chuse, and may insert their agreement in their submission, or the condition of their bond or promise, and upon producing an affidavit of such agreement, and reading and filing the same in the court, or personally appearing before said court and acknowledging the same, and desiring the same may be made a rule of court, the same may be entered of record in such court, and a rule of court shall therefore be made that the parties shall submit to, and finally be concluded by such arbitration or umpirage, and on the award of such arbitrators being returned into court, in case of disobedience of either parties, said court may grant execution for the sum awarded, with cost. When a personal action is pending before a court, the parties may make a reference of it, each chusing a man, and the court appointing a third; and the award made by such referees, or any two of them, and returned into court, and accepted, shall be a final settlement of the controversy, and execution may be granted for the sum awarded, with cost.

The parties may appoint such a number of arbitrators as they judge proper, but the usual custom is to appoint three. When they appoint but one, he is called an umpire, and the proceeding an umpirage. Sometimes it is agreed by the parties, that if the arbitrators cannot agree, they shall call in an umpire, who shall determine the matter; but as the whole proceeding depends on the will of the parties, they can model the appointment as they please, and the arbitrators must pursue their instructions. Where three or more arbitrators are appointed, it is usual to insert a clause in the submission, that either two agreeing shall make an award. But if three or more are appointed, and nothing is said in the submission respecting

Respecting the number that must agree to make the award, it will be intended and presumed to be the agreement of the parties, that the majority of the arbitrators agreeing, shall make an award.

A submission contains the instructions to the arbitrators, and may be general, comprehending all matters of dispute, or special, including only some particular matter of dispute, specified in the submission. A submission may be written or parol. In either case it must contain the appointment of the arbitrators, and the matter in dispute that is submitted. If it be general, it is sufficient to say all matters of dispute; if it be special, the particular controversy submitted must be described. It must point out the time and place of meeting, and the time when the award must be published. It is proper that the submission should ascertain the number of arbitrators, that must agree to make an award; and whether the award shall be in writing or by parol. If this be not regulated in the submission, the rule is, that if the submission be in writing, the award must be in writing: but if by parol, then a parol or written award will be good.

Every submission to arbitrators implies an agreement and promise to abide the award that shall be published, if the parties make no express promise. And upon a naked submission without any promise to abide, action will be upon the award, in case of non-performance, and such award will be a good bar to another action. In submissions however, it is the usual practice for the parties to become bound to each other, to abide such award as shall be published; for this purpose the parties frequently enter into bonds, the conditions of which contain the articles of submission, and the instruction to the arbitrators. These bonds are sometimes delivered to the arbitrators, third persons, or to the parties themselves. In case of a delivery to the arbitrators, or third persons, if the parties abide the award, then the bonds are to be given up to them — if not, then to be delivered to the persons abiding the award; but it is most proper where bonds with conditions are executed, that they should be delivered to the parties themselves: for by the terms of the condition they are void if the party abides; and if not, then the party who refuses to abide the award, is liable to the action of the other party, on such bond, by force of which he may  
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recover



recover the sum awarded to him. But notwithstanding the bond an action will lie upon the award, in case of non-performance to recover the sum awarded.

But the most common practice is to make a parol submission to arbitration; and then the parties execute to each other promissory notes, and deliver them to the arbitrators, or third persons, to be holden upon certain conditions; that if the parties abide the award, to be delivered up, but if either fail, then his note to become forfeit, and to be delivered to the party abiding the award. On such note all the damages may be recovered for a non-performance of the award. A doubt has sometimes been expressed respecting the validity of arbitration notes. But in all cases of a delivery to the arbitrators, or third persons, to hold them on certain conditions, there never could be any doubt respecting their validity, because all such notes are escrows, holden by third persons, and to take effect upon the happening of a certain contingency. If this contingency never happens they are void in the hands of the third persons, but if it does, then the delivery by such third person, to the person for whose benefit he holds such notes, is considered as the delivery of the promisee, and by force thereof they take effect.—But even in cases where arbitration notes have been delivered to the party himself on parol condition, it has been determined that they should operate only for the purpose intended, and were subject to, and governable by the conditions on which they were delivered. In the case of Knight, against Smith; this point was adjudged by the Superior Court. Action was brought on a note of hand, delivered to the party himself on condition of a submission to arbitration, and the abiding the award that should be published.—No award was made, and the special matter being pleaded, the question on demurrer was, whether parol conditions could govern, restrain, control, or defeat a written contract delivered to the party himself, and not to a third person as an escrow. The Court adjudged the note to be void on the principle that if was an arbitration note, and that the practice of this State had admitted arbitration notes to be delivered to the party, to be subject to the conditions on which they were delivered. But I presume that this decision is not to be extended to any other species of notes—but  
that

that all others are to be governed by that general principle of law which is founded in reason, that no parol conditions or agreements, shall vary, control, or defeat a written contract.

To make an award binding it is necessary that the arbitrators pursue the instructions contained in the submission, and publish their award in the time limited.

For the purpose of fully investigating this subject, it is necessary to consider—

1. What things may be submitted to arbitration and of revocation.
2. Who may submit to arbitration, and who may be arbitrators.
3. What is essential to a good award.
4. Of the pleading of awards.

1. I consider what things may be submitted, and the power of the parties in revoking their submissions.

It may be laid down as a general principle that all matters of dispute of a personal nature, may be submitted to, and settled by arbitrators. So may all trespasses, or injuries that concern real property. But a freehold, or inheritance in lands, or matters of dispute that respect the title of lands cannot be determined by an arbitrament, nor can the interest of an estate for years be determined, or transferred by an award, because it is a chattel real—but in these cases if the submission be by bond or note, and either party refuse to comply with the award, the bond is forfeited, and an action will lie on such bond, for the recovery of damages.

6 Tho' the title of lands cannot be directly submitted, so that an award shall decide it, yet in case of a submission of the title to lands, the parties may lodge quit-claim deeds with the arbitrators, duly executed, and acknowledged, to be by them disposed of as they shall award the title. And if they hear the matter and make an award with respect to the title, and deliver the deed to him in whom they find the title, this will be valid—and after the publishing the award, the party against whom it is cannot forbid the delivery,

delivery, for by the publishing of the award the condition of the delivery is performed, and the deed becomes absolute,

• Causes of a criminal nature are not determinable by an award, because they ought to be punished for the public good ; but any private damages to which a person is entitled by reason of a criminal act, may be submitted, and the party injured may recover his private damages. • Causes of matrimony cannot be determined by arbitration, because marriage ought to be free, and persons who are married according to law cannot be severed, but by process of law. The damages however sustained by breach of a marriage contract, or any thing relating to a marriage portion may be submitted.

It is said that a certain, and fixed debt cannot be discharged by an award, because the business of arbitrators is to reduce uncertain things to a certainty. It is also said that debts due by specialty cannot be discharged by a naked award. But there can be no doubt that by our law all matters of debt due by specialty, or simple contract, if they are disputed may be submitted, and that an award will discharge the original contract.

In case of submission by rule of Court, the parties have no power of revocation, • but in all cases of submission by the parties out of Court, they may revoke the submission at any time, before the publication of the award. • If the submission be naked without deed, the opposite party has no remedy for damages because no action can arise from a naked submission. If the submission be by bond or note, they become forfeit, and the party injured may thereon recover his damages which can be only for his cost, and trouble, and the real dispute will remain unsettled. • If the submission be by deed, it is in its own nature countermandable, though made irrevocable by express words of the deed ; for the arbitrators being constituted, and put in the place of the parties by their consent, they can act only while they have their consent.

2. Who may submit to arbitration, and who may be arbitrators.

• Every person legally capable of making contracts may submit

• 1 Bay. Abr. 133. • Ibid. • Ibid. • 8 Co. 82. • Ibid. f 3 Bac. Abr. 146.

mit his controversies to arbitration. The parties have an exclusive power to exercise their judgment, and discretion in respect of the persons to be arbitrators, and may elect and appoint whom they please. Therefore married women, infants, or any persons may be appointed; and as a person has a sovereign uncontrollable right of election, he cannot afterwards find fault if he elects persons who were incapable of performing the trust. If a submission be made to one of the parties it is good.

### 3. What is essential to a good award.

a It must be made according to the submission as it respects the parties, and matters submitted. An award that an act should be done by a stranger is void, because he is not within the submission; but an award to do an act to a stranger is good, for the stranger is put by the arbitrators in the place of the party, and they have power to award the act, since it is not impossible; or unequal. An award of things not submitted is void, but where the award is of several things, part within, and part out of the submission, it is voidable for that which is out of the submission, and good for the residue. b If the arbitrators award on one side an act contained in the submission, and on the other side an act out of it, the whole is void because it is unequal. An award may be good as far as it extends, tho' made of less than what is contained in the submission.

c An award ought to be equal and not on one side only, for it must appoint either party to give, or do something beneficial, or advantageous. This however must be understood in a limited sense; for in all controversies between two parties that which is awarded to be done to one, must be advantageous to both, so as to finish the controversy, and discharge one, as well as give satisfaction to the other; and where it appears notwithstanding the award, that the thing remains a duty as before, and is not discharged by the award, it is apparent that the award is on one side only, and consequently is void. This rule therefore does not require that something should be awarded to be paid to both parties, and that where something is awarded to be paid to one, and nothing to the other, that therefore the award is void; for it may be the case that he

was

was the wrong doer, and nothing was due to him. The rule therefore only means that the award shall be mutually beneficial by settling the dispute; therefore awarding that one shall pay damages, and be thereby acquitted of the demand, is beneficial to both.

It has been supposed by some that there must be awarded mutual discharges, and acquittances. This unquestionably is very proper—but not absolutely necessary. Where mutual acts are awarded, there can be no necessity of discharges. But where one party is ordered to pay a certain sum, or do a certain act, and the other is to pay, or do nothing, there must either be discharges awarded, or it must appear that the money to be paid, or the thing done is in satisfaction of some debt, duty or trespass, and by which he is acquitted therefrom—otherwise the award is ill. If in the award it be expressed that the sum awarded to be paid, be on account of the matters in dispute, or in satisfaction of a debt or trespass, then the law implies a discharge from the demand, and the award is good. Thus in the case of a trespass submitted, if the arbitrators award that one party shall pay the other three pounds, this is void, for it is manifestly of one side only, and it does not appear for what it is paid, or that the trespass is discharged, and therefore the party, who is to pay has no advantage by the award. But if the award had been that he should pay so much for the matters aforesaid, or on account or in satisfaction of the trespass, then it would have been good, tho' one side only was to do an act, because the trespass would thereby be discharged, which is beneficial to both parties.

\* An award that a person should do an act of advantage to nobody, is void. A naked award is said to be no good plea in trespass, and that something must be awarded to the plaintiff in assumpsit, for if there be no trespass, there is nothing about which an award can be made, and if there be one, and the arbitrators do not award satisfaction, they do not act according to the design of their institution, for they are not indifferent, and so there is no award. This rule must be taken in a qualified sense. It can be supposed to mean no more than this, that where a person makes a demand upon another for damages on account of a trespass, and they submit,

submit, and the arbitrators award that nothing shall be paid, then the award is void—and this may be called a naked award—*for no thing is awarded from one to the other*; but if the arbitrators, should on a full hearing of the parties, judge that no trespass had been committed, and therefore award no damages, this could not be called a naked award, because they decide respecting a certain fact, which takes away the right of demand from one, and discharges the other, which makes the award equal, and mutually beneficial. It may therefore be laid down as a rule, that where a challenge is made for damages on account of a trespass, and the matter being submitted, the arbitrators award that no trespass has been committed, that this is a final settlement of the controversy, and may be pleaded in bar of an action brought for the same thing. But if a literal construction of the common law rule be admitted, a claimant may, after a full hearing before arbitrators, and an award that no trespass has been committed, and that he has no right to recover damages, might then resort to his action at law, and have another trial on the merits, because as it said, that if there was no trespass, there was nothing about which an award could be made; and if there was a trespass, damages ought to be awarded. This reasoning however is founded upon a palpable absurdity. For by the submission, the arbitrators are to decide whether a trespass has been committed, or not; and they are as competent to say, that there has been no trespass done, as they are to say there has been, and to award damages therefor. If they decide that no trespass was committed, it cannot be said that there was nothing about which an award could be made, because the determination that no trespass did exist, is deciding upon a fact that was the ground of the controversy between the parties. But if we suppose the rule to be founded on the idea, that the parties recognize in their submission that a trespass has been committed, then perhaps an award that nothing should be paid would be void.— This however, cannot be supposed to be the principle on which the rule is founded—because it says if there was no trespass, there could be nothing about which an award could be made, which supposes an enquiry respecting the existence of the fact. But if in such cases the arbitrators should find that no trespass had been committed,

ted, and award nothing to be paid to the claimant, and that he should pay cost, or that the parties should execute discharges, then the award is by no means naked, and must upon the clearest principles be held good.

• The performance of an award must be possible, and lawful; therefore an award to do a thing that is against law, or that in the nature of things is impossible, is void. • An award ought to be certain, and final, so as to make an end of the controversy. A conditional award is not good because not final—so where a thing is referred to the future judgment, or exposition of the arbitrators it is void. An award may be good for part only, but then it must be final as to that part.

• Every award is to receive a liberal construction, and to be governed by the intent of the arbitrators, where no inconvenience will ensue. If no time be limited for the performance of an award, it is to be performed in a reasonable time.

#### A. Of pleading awards.

• A good award may be pleaded in bar to an action brought for the same thing. An award to pay money at a day to come, may be pleaded in bar to an action brought for the same thing before the day; because it becomes immediately a debt due, tho' to be paid at a future time; but if the money be not paid, or tendered by the day, then an action may be brought for the original thing, and such award is no bar; because of his neglect to perform it.—

• Where an award directs only mutual releases, it is not a bar to an action brought for the thing submitted, till the releases are executed. If one party should refuse to execute his release, and should bring an action for the original thing, the award can be no bar to the recovery—but the other party may bring an action against him for refusing to execute such release, and recover back all such damages as were recovered from him. In such cases perhaps the wisest principle would have been to have made such an award when the party had tendered a release, a bar to an action for the same thing, tho' the plaintiff refused to release, which would have saved one action. A distinction is taken between awarding collateral things to be done, which raise a new duty,

• 1 Bac. Abr. 146.    • Ibid. 147.    • 3 Str. 69.    • 1 Bac. Abr. 150.  
• Carth. 278, Ld. Raym. 247.

ty, and discharge the old, and therefore may be pleaded in bar tho' not executed, and when a release only is awarded, which creates no new duty. It is however manifested that the awarding the execution of a release is a new duty, and ought as much to discharge the original right of action as any collateral thing.

When an award is regularly made it can be set aside only for corruption, and misbehaviour in the arbitrators. There can be no appeal, no new trial, no review of the merits of the cause.—When the party has elected his triers, he must be bound by their sentence. But when the arbitrators exceed their instructions, and do not comport with the formalities of law respecting awards, their proceedings are of no validity. When they are guilty of corruption, misconduct and partiality, courts of equity may interfere, and set aside their awards. If three arbitrators are appointed, and two should exclude the other by fraud or force, and have private meetings, and admit one of the parties, the award would not be good. Courts of equity may also set aside awards where the arbitrators committed mistakes—but these mistakes must not be confounded with misjudging. They must be mistakes merely in computation, or calculation, which they would have corrected in the time of it, had they discovered them—but where they proceed upon erroneous principles, and misjudge with their eyes open, there is no possible remedy to set aside their awards, however remote from justice; for as the parties elect them, they must abide their determinations.

Upon a motion to set aside an award of arbitrators, where the submission was by rule of Court, on the ground that the arbitrators had mistaken the evidence, and the law, the Court refused to make any enquiry, because it would defeat the main design of arbitrations, to subject awards to a revision in the nature of an appeal; and arbitrators being judges of the parties choosing, they are at liberty to decide on any principles, which, in their opinion will do justice between the parties, and the reasonableness or unreasonableness of an award, does not affect its validity—if there be no misbehaviour, or corruption in the arbitrators.



## OF THE REDRESS OF PRIVATE WRONGS BY SUIT OR ACTION.

**I**N the preceeding chapter, having discussed the remedies that result from the operation of law, and the act of the parties : I next proceed to consider the various kinds of remedies by suits, or actions brought before courts of law instituted to hear and determine them. In the first book of this work, I treated at large of the several courts, and their jurisdiction ; and of course we are prepared to delineate the mode of application to such courts, to obtain a redress of injuries.

A wrong or injury is defined to be a deprivation, or infringement of right. A simple restitution of that right to the party injured, would not be a complete compensation, because damage must accrue to him for the loss of the use, and enjoyment of it. To furnish adequate relief, it is necessary that something should be given in satisfaction of such damages. There are many instances in which a specific restitution of the right, cannot be accomplished ; as in cases of assault, and battery, false imprisonment, and the like. A reparation of such injuries can be made only by compelling the wrong-doer to give something to the injured party, by way of amends, and satisfaction. In almost every instance of a wrong to personal property, it will be impossible to make specific restitution, for the property may be destroyed, or conveyed away out of the reach of the law. On this account, there is no remedy to recover the specific thing, if it be of a personal nature, but only something as a compensation for the damages.

In disputes respecting the title to things real, this difficulty does not exist ; but the possession of the land in controversy may be recovered. A remedy therefore is calculated for that purpose, whereby the party injured recovers possession of the land, as well as damages, for the injury. The damages in all cases are assessed in money which is the medium of commerce, and the standard to ascertain the comparative value of different kinds of property, and is a fixed, and accurate measure for the estimation of damages.

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An application to a court of law for the redress of a wrong, is called a suit or action ; which may be defined to be " a protection before a court of law for the recovery of one's right." The person who brings the action, is called the plaintiff, and the person against whom it is brought, is called the defendant. Actions are as various and as numerous as is necessary to redress all the wrongs that mankind can suffer. For every injury that a man can sustain from his fellow-creatures that comes within the description of law, an action is framed by which he can obtain satisfaction. It is therefore a common maxim, that for every wrong there is a remedy.

Actions may be divided into two kinds, personal and real. Personal actions are those by which a man claims damages, as a satisfaction for the non-payment of some debt, or the non-performance of some duty, or for some injury done to his person, or to his property, either real or personal.

Real actions are brought for the recovery of the possession of things real, and also for damages as a satisfaction for unjustly depriving, or holding the plaintiff out of possession. By the law of England, real actions are calculated only to recover possession of things real, and not to recover any damages. They have therefore introduced another species of actions, called mixed ; which is said to partake of the nature of real and personal actions, because they recover thereby the possession of the lands, as well as damages. In this state we have no action that comports with the English definition of a real action. Our action of disseisin compares with the English real actions in this respect, that it will be in all instances for the recovery of the possession of lands, where the plaintiff has a right of property ; and with their action of ejectment, as damages may be thereby recovered. But as this is the only kind of real actions known to our law, and as it would be improper to admit a division of actions called mixed, when the law does not know the original kinds of actions of which it is compounded, I have thought proper to reject this division of actions, and to consider our action of disseisin to be a real action, tho' damages can be recovered by it. This will simplify our legal system by retrenching unnecessary divisions.

Personal

Personal actions are subdivided into two kinds—actions that are founded upon torts, or wrongs, and actions that are founded upon contracts. Actions founded on torts, are again divided into two kinds: one where the act complained of is immediately injurious, accompanied by some degree of actual force or violence; as trespass, battery, false imprisonment, and the like. The other is where the injury is not accompanied with actual force and violence, and is injurious in its consequences only; as slander, malicious prosecution, trover, and the like. These two kinds of actions are distinguished from each other by denominating the former trespass with force, and the latter, trespass on the case.

Actions founded on contracts, are to recover damages for the non-payment of some debt, the non-performance of some contract, or the neglect of some duty. Such are actions of debt, covenant, account and assumpsit, and book debt.

It may not be improper to make a few remarks upon the origin of actions of trespass on the case, which are synonymous with actions of the case, as this subject is not fully explained by the elementary writers on the law. Originally by the common law, all the actions that were grounded on torts were trespass, replevin, detinue and deceit. Conspiracy was introduced by statute in the reign of Edward I. and all the actions grounded on contracts were debt, covenant, and account. Tho' these actions might be sufficient in the early periods of the English government, when there was but little personal property, and the people being in the agricultural state of society, paid their chief attention to lands, in their actions respecting which they proceeded to great lengths in refinement; yet when they arrived to the commercial state, and the principles of jurisprudence were better understood, as well as personal property largely increased, it was apparent that new remedies must be devised. It is manifest that the action of trespass could not extend to a vast variety of injuries, to which mankind are exposed. Such are those which are unaccompanied by force. The admission of the defendant to wage his law in actions of debt and detinue, must have been productive of great mischief and injustice. No action of covenant could be maintained unless the plaintiff could produce on trial, a covenant in writing. This precluded any remedy on all parol co-

<sup>a</sup> 1 Espin. Digest, 1.      <sup>b</sup> 3 Reeve's Hist. English Law, 38, and—2. 329.  
<sup>c</sup> 2 Reeve's Hist. Eng. Law, 239.

contracts and promises. The imperfection of personal actions, rendered it absolutely necessary, to establish some new actions, or extend the old remedies to supply the defect.

A hint to adopt the necessary improvements, was taken from the statute of Westminster the second, passed in the thirteenth year of the reign of Edward the first, which enacted, "that as often  
" as it shall happen in chancery, that in one case a writ shall be  
" found, and in a similar case depending on the same principle, and  
" wanting a similar remedy, no writ can be found, then the clerks  
" of the chancery shall agree in making a writ, or adjourn the  
" case to the next parliament, and write the case in which they  
" could not agree, and refer it to the parliament, when a writ  
" should be made with the advice of persons learned in the law;  
" lest it might happen that the king's court should for a long time fail  
" in administering justice to complainants." This statute establishes a principle, the carrying of which into effect, must necessarily be productive of a progressive improvement in jurisprudence. In the reign of Edward III. the courts of law discovering the imperfection of the writ of trespass in the old form, were not content with it; they therefore availed themselves of this statute, authorizing writs to be framed in similar cases, and endeavoured to render it more universal by enlarging its scope, and modifying its terms, so as to adapt it to every man's own case. Tho' this innovation met with some opposition, yet we find in the reign of Henry IV. that writs of trespass were extended to a great variety of new cases: and had assumed the name of trespass on the case. In this reign the marks of discrimination between trespass and trespass on the case, began to be distinctly ascertained: that the former should be always with force and arms, and the latter never. This action was by degrees extended to a vast variety of cases for which there was no remedy at common law, and adapted to many cases for which there was a specific remedy at common law, and on account of its greater convenience superseded them, such as deceit, conspiracy, and detinue.

The great advantages derived from the action of trespass on the case, made courts desirous of extending the same principles to actions founded on contract, to avoid the inconvenience of wager of law

a 2 Reeve's Hist. Eng. Law, II. 202, 203.—2 Cok. Inst. 404, b 3 Reeve's Hist. Eng. Law, 89.

law in debt, and the necessity of evidencing a contract by a specialty in covenant. Tho' it seemed harsh to comprehend under the name of trespass the non-performance of promises, yet after some time the necessity of such an amendment of the law induced courts to admit these new writs, and by a long train of rational, liberal and equitable decisions, the courts of law have perfected the mode of redressing wrongs by actions. This noble improvement is owing to the principle promulgated in the statute of Westminster the second, which authorized the framing writs in similar cases. It is wonderful to survey the various improvements and additions, which have been made to the English jurisprudence in the exercise and application of this fundamental principle. They have from time to time, devised remedies as the exigencies of mankind required, in a gradual progress from the simplest stages of society, to the complicated interests of commerce, luxury, and the highest refinement of manners. The system of jurisprudence has become so perfect, that it can hardly be expected a case should arise that does not come within the description of specific remedies, well known and established. Yet the same principle which has produced such wonderful improvements in hands of judges, may still be called into exercise whenever there shall be an occasion.

The personal actions now remaining, which originally existed at common law, are trespass and replevin, for torts or wrongs; and debt, covenant, and account, for contracts. These may be deemed original specific actions, having appropriate names. All other personal actions may be denominated actions of trespass on the case, and were introduced and established in the manner I have related. But tho' all these actions so introduced, have been indiscriminately by writers, called actions of trespass on the case, and actions on the case; yet we find in the progress of juridical improvement, that certain classes assumed specific names, by which they are also known. Assumpsit will comprehend all new remedies that have been devised respecting actions founded on contracts. Trover, slander, and malicious prosecution, have received names among the actions of trespass on the case, which are founded on torts. But on account of the difficulty of classing all the actions that arise in the course of things, we find that there are some injuries which must be yet classed under the general name of trespass on the case.

Having

Having premised these general observations upon the nature of actions, I shall now proceed to delineate every kind of action, that is necessary to redress every possible injury. In the first place I shall treat of those actions which respect persons, and then those which respect things. In the former part of our inquiries we have considered the various rights of the people. Wrongs being only a privation of rights, I shall pursue this branch of the subject under the same distribution, and shall unfold a system of wrongs correspondent with the former system of rights.

Rights are divided into absolute, and relative—absolute, such as belong to men as individuals, which are personal security, personal liberty, and private property. Relative, are such as belong to them as members of society, which are the relations of husband, and wife; parent, and child; guardian, and ward; master, and servant. Of each of these I shall treat in their order reserving the consideration of actions respecting private property to the last division.

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### CHAPTER THIRD.

#### OF ACTIONS FOR INJURIES THAT AFFECT THE RIGHT OF PERSONAL SECURITY.

THE right of personal security consists in the preservation of one's life, limbs, body, health, and reputation. The injury of depriving a man of his life is deemed the highest offence against society, and is punishable with death. This subject will be considered when we come to treat of crimes. In this chapter I shall consider—

I. The injuries that affect the limbs, and body of a person, and the modes of redress.

II. The injuries that affect a man's health, and the modes of redress.

III. The injuries that affect a man's reputation, and the modes of redress.

I. I am to attend to a consideration of the injuries that affect the limbs, and body of a person; and the remedies. To investigate

gate this subject with the greater perspicuity, it will be convenient to attend to the following divisions.

1. What acts amount to an infringement of the right of preserving the limbs, and body of a person.
2. What shall be a sufficient excuse for an assault, and battery.
3. What actions may be brought for the recovery of damages, for these injuries.

1. I am to consider the acts done by a person to the limbs, and body of another, which constitute civil injuries. I shall first expound the common law, and then the statute law. Two injuries may be committed by the common law, assault, and battery.

1. *Assault* is the unlawful setting upon a person of any one, by the offer or attempt to beat, tho' without touching the person, as by striking at him with, or without a weapon, and missing him, or presenting a gun at him, at a distance to which the gun will carry, or pointing a pitchfork at him, standing within reach of him, or by holding up one's fist at him, or by drawing a sword and waving it in a menacing manner. *But* if in doing such act he makes use of such expressions, as shew he has no intention to strike a blow, it is no assault; as where a person lays his hand on his sword as if to draw it, this might be deemed an assault, but when he says—If this was not assize time, I would not take such language from you. These words shew he had no intention to do any corporal hurt, and explain away the implied insult. *No* words whatever, let them be ever so provoking, can amount to an assault. Every battery includes an assault.

2. *Battery* is an actual commission of violence to the person. Any injury however small that is done to a person, in a spiteful, revengeful, rude, or insolent manner, either by beating, striking, or pushing him, or by spitting in his face, treading on his toes, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law. For the law holds every one's person to be sacred, and no one has a right to do him the least injury, and as it is difficult to draw a line of distinction between different degrees of violence, it is necessary to prohibit it in every stage, and then give damages according to the nature

*a* v Espin. Dig. 383. Finch's Law. 202. *2* Roll. Abr. 345. Hawk. P. C. 133.  
*b* Gilb. Law Evid. 256. *c* Hawk. P. C. 174. *d* 1 Espin. Dig. 384.

ture, and aggravation of the injury. Battery not only comprehends the least actual violence, but the greatest, and includes not only wounding, but mayhem, which according to the common law, consists in depriving a person of some member necessary for his defence in fight, which are said to be arms, fingers, eyes, foreteeth, and some others. But this is only considered to be an aggravated species of battery, and the same remedy is given as in other batteries. The act causing the injury to the plaintiff, need not proceed from the immediate assault, or act of the defendant, for there are many acts which cause another person, or thing to commit a battery, for which actions will lie.

As where the defendant wantonly threw a lighted squib into the market place, which being tossed by different persons from place to place, in their own defence, without any reflection, and without any design, but to save their own property, at last hit the plaintiff in his face, and by the explosion put out his eye; it was adjudged that this action would lie, tho' the injury was caused immediately and directly by the last persons throwing the squib into the face of the plaintiff. For the first act was unlawful; the squib had a natural power, and tendency to do mischief indiscriminately, wherever it should fall, and therefore would necessarily produce a defence by every person in danger of being hurt thereby; and every action thus done in self-defence is to be considered, as a continuation of the act of the defendant, till the explosion of the squib, when it would cease to be dangerous. Therefore all the acts of throwing the squib, were considered as one single act; and this the act of the defendant. Had a stone been thrown into the same place, and ceased its motion, and then been taken, and thrown by another person, by which an injury was done, the last person throwing it must have been responsible for the damage; because the stone had ceased to have any power to do mischief—but the squib had the power of hurting, till it exploded, and therefore persons exposed to be hurt by it, would necessarily remove it, and the explosion at last being owing to the act of the defendant, he may be considered as the immediate cause of the injury. If a man turns out a mad bull, unruly ox, a lion, tyger, or any wild mischievous creature, among people, by which an injury is done to

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any person, he is responsible for such act in an action of trespass with force—for the turning such creature loose, is the very act of the person, and is as much an assault, and battery, as to shoot a bullet out of a gun. If a person exposed to be hurt by such creature, should in self-defence turn it upon another, who should be hurt, the first actor would be answerable for such injury in an action of trespass with force, and arms.

*a* If a man strike, or frighten a horse, by which he runs away with the rider, or hurts the rider, or any other person, he is liable to answer for such injury, because the act of striking the horse is the immediate, and necessary cause of the injury. So if one man push another against a third person, by which either, or both are hurt, this is actionable, as an assault and battery.

*b* When a person does an injury to another without design, and by inevitable accident, he is not liable to an action. If a horse upon a sudden surprise runs away with the rider, and runs against a man, and hurts him, it is no battery. So if I am pushed by one against another, and hurt him, this is no battery in me.

*c* Where a person is doing an act which it is his duty to perform; hurts another without default or design, he is not guilty of a battery. As if a soldier in exercise, hurt by accident his companion, it is not actionable—but if he had hurt him wilfully, and with design, he would have been guilty of a battery.

*d* Where a person is doing an act which he is under no particular duty to perform, he is accountable for any injury to another done either by carelessness or accident, and whether it be criminal, or innocent, as where the defendant was uncocking a gun, and the plaintiff standing by to see it, it went off, and wounded him, it was held that the plaintiff might maintain trespass for the injury. For every man is answerable for every injury he does, altho' he do it without any design, and by accident—unless the injury done by him was inevitable.

*e* Where a person receives a bodily injury, in consequence of an act done by his own consent, he cannot maintain an action for the battery; as where two persons played at cudgels by consent, and

*a* 1 Espin. 385. *b* Ibid. *c* Ibid. *d* 3 Wills. 407—1 Strang. 596. *e* 1 Espin. Digest. 385.—Hob. 138.

one hurt the other, it was held no battery, because to him who consents, there is no injury done.

*a* But in such case the act from whence the injury proceeds must be lawful ; for wherein the action of trespass for assault and battery, the defendant would have given in evidence that the plaintiff boxed by consent, from whence the injury proceeded, it was held to be no bar to the action ; for as the act of boxing was unlawful, the consent of the parties to fight could not excuse the injury. So if one licence another to beat him, such licence is void because it is against the peace.

*b* Such is the common law respecting assault and battery. By the statute against breaking the peace, it is enacted, that whosoever shall disturb, or break the peace, by tumultuous, and offensive carriages, threatening, traducing, quarrelling, challenging, assaulting, beating or striking any other person, such person or persons so offending, shall be liable to pay to the party hurt, just damages, and also shall pay such fine as on such consideration of the parties, the instrument made use of, the degree of danger, the time, place, and provocation, shall be judged reasonable. In expounding this statute, I believe, the common law doctrines respecting assault, and battery has been the rule.

2. What shall be a sufficient excuse, or justification of assault and battery.

*c* Where a person is acting under an authority given him by law, that shall be a sufficient justification ; as if an officer has a writ, or warrant against a person, who will not suffer himself to be arrested, he may justify a beating, or even a wounding, in an attempt to take him. *d* But a battery cannot be justified by an arrest, under process only, it will only justify the assault—for to justify a battery, resistance or an attempt to rescue himself out of custody, should be shewn ; unless it be justified by way of gentle imposition of hands ; in which way only a defendant may justify beating, without showing any resistance or attempt to rescue.

*e* So in the exercise of his office a church warden, and by parity of reason, a tythingman, may justify taking off the hat, or laying hand

*a* 1. Espin. 385. *b* Stat. 188. *c* Hawk. P. C. 130. *d* 2 Strange 1049.  
*e* 1 Espin. Dig. 387.—1 Saund. 13.

hand on a person who is disorderly in the church, or meeting, and turning him out for disturbing the congregation.

*a* So a person may justify even a mayhem, if done by him as an officer of the army, as a punishment to the plaintiff for disobedience of orders, or other military crime.

*b* A man may justify for an assault, and battery against any one, who assaults his wife, parent, or child, if done in the defence. A wife may justify an assault in defence of her husband. A servant may justify an assault in defence of his master, but a master cannot justify in defence of his servant; for the master may have an action against him, who beats his servant, for the loss of service, but a servant can have no action for the beating his master.

Any person may justify such acts, or assault, as shall be necessary to prevent persons from fighting, and breaking the peace.

*c* A person may justify the battery of one who attempts wrongfully to dispossess him of his lands, or take away his goods. But in case of an entry on the lands, it must not be justified, as a battery, but as a gentle imposition of hands. *d* Where the injury is a mere breach of a person's close, the defendant cannot justify a battery, without a previous request to depart; but it is otherwise, if one breaks down a gate, and enters with force, and arms, for there it is lawful to oppose force with force.

A parent may give reasonable correction to his child, a master to his servant, or apprentice, a school-master to his scholar, or a gaoler to his prisoner.

*f* Wherever the assault, or battery proceed from the plaintiff's own fault, it is a sufficient justification of the defendant. So where the defendant can prove that the first assault proceeded from the plaintiff, he is excusable. *g* If the defendant proves that the plaintiff first lifted up his stick to strike him, and offered so to do, it is a sufficient assault to justify his striking the blow; for he need not stay till the plaintiff has actually struck him, for he might be disabled by the blow.

*h* There must be some proportion between the battery given, and the

*a* Bull. N. P. 19. *b* 1 Ld. Raym. 62.—Salk. 407. *c* Hawk. P. C. 130.  
*d* 2 Salk. 641. *e* Hawk. P. C. 130. *f* Espin. Dig. 388.—Cro. Jac. 366.  
*g* Bull. N. P. 10. *h* 3 Salk. 642.—1 Ld. Raym. 177.

the first assault, for every assault however small, will not justify an enormous battery. The rule is, that the defendant may strike such a blow as is necessary in his own defence. Therefore if a little blow be given by one to another, and he gives in return so violent a blow, that he maims the other person, he cannot justify it, on the ground that the first assault was made on him. But if the plaintiff strike the defendant, and a scuffle ensues, and the parties close immediately, and in the scuffle the defendant maims the plaintiff, he may justify on the plea, that the plaintiff made the first assault.

It is said that if an assault happen in a church-yard, the defendant cannot justify under the plea, that the plaintiff committed the first assault : for the law so abhors violence in churches and church-yards, that it will not allow a man to strike there even in his own defence. This is clearly a relic of the superstition of the dark ages, but I presume this will not be deemed law in this enlightened period, when mankind have discovered that holiness cannot be predicated of mere place.

The justifications by the common law must be pleaded specially in bar of the action, but by our statute law they may be given in evidence under the general issue.

3. I am to consider the actions that can be brought to recover damages for the injury of assault and battery.

1. Action of trespass with force and arms, commonly called *Assault and Battery*, is the proper remedy at common law. The declaration must charge the facts to be done, with force and arms, and against the peace, or to that purport. *b* The offence should be charged fully and positively, and not by way of recital, as whereas the defendant on a certain day made an assault.

*c* The declaration in assault and battery, cannot lay the offence on a day certain, and on divers other days and times, for an assault is one entire individual act, and cannot be committed at divers times, nor laid with a continuando, for upon such a declaration, it is impossible for the defendant to know whether the plaintiff means to prove one assault only, or twenty ; and therefore he cannot be prepared to justify.

For

*d* For a battery to the wife, the husband and wife must join in the action, and it must be laid to *their* damage, because the husband is put to expence for her cure, and in bringing the action; and the right of action could survive to the wife, to whom the injury was committed: If therefore it be laid to *his* damage only, the declaration is ill. For an assault and battery committed upon both the husband, and wife, he must bring an action alone for the injury done to himself, and cannot join her in an action for such an injury.

*e* As every trespass is in it's nature joint, and several, where sundry persons are guilty of an assault, and battery, the plaintiff may bring his action against them all, or against part of them, but can bring one action only. If they plead several, and distinct *b* pleas that have separate trials, and which do not avail them, entire damages must be assessed and not several. Part may be convicted, and part acquitted. *c* A recovery against one will bar an action against another joint trespasser; for a plaintiff shall have but one satisfaction for an injury, tho' the assault and battery be committed by several, and tho' his action be brought either joint, or several. The jury cannot sever the damages, where action is brought against several, so as to give more against one, than the other.

*d* If the plaintiff has once recovered damages, for the assault and battery, he cannot afterwards recover in a new action, for any further mischief, or injury arising from the same battery. As where after the plaintiff in this action, had recovered damages for the battery, a piece was cut out of the skull in consequence of the former wounding, for which he brought a new action; but it was held not to lie. For the battery itself was the ground of the action, and the injury the measure of the damages; but here the ground of the action was gone by the former recovery.

*e* In an action by the husband, and wife, for the battery of the wife, on the general issue pleaded, the defendant shall not be allowed to prove, or go into evidence that the woman is not the wife of the plaintiff, for it should be pleaded in abatement, so that the plaintiff might meet the objection fairly.

*f* If the declaration charge the assault and battery to be committed

*a* 1 Espin. 391. *b* Cro. Jac. 112. *c* Yelv. 68. *d* Salk. 11. *e* 1 Strang. 480. *f* Litt. sec. 485.

mitted in one town, and on trial it shall be proved to have been committed in another, it is good because this action is transitory. If the trespass were done on the fourth of May, and the plaintiff alledge the same to be done on the first, or fifth of May, when no trespass was done; yet if upon the evidence it appear that the trespass was done before the action was brought it is sufficient. It must further be observed, that the trespass must have been done not only before the bringing the action, but also within the time, not excluded by the statute of limitation: and let the day in the declaration be alledged to be on any day within that time, and let the proof be of any other day in that time, it is good.

2. A *qui-tam* prosecution, grounded on the statute, may be brought by the party injured, to recover damages for an assault and battery.

In all cases of assault and battery, there is not only a private injury done to the party; but the public peace is disturbed, and broken. Such an act is therefore denominated a breach of the peace, and the statute inflicts a punishment by fine upon it, in behalf of the public, and provides that the wrong-doer shall pay just damages to the party injured. By the common law, these acts are considered in a separate view, being called an offence against the peace, as it respects the public, and a trespass as it respects the individual. The party therefore brings his private action for the recovery of damages, and the public institute a prosecution against him for the crime. Of course, by the common law, there is no connection between the public, and the party in prosecuting an offender for an assault and battery. But when our statute made the same acts an offence against the public peace, and a trespass against the party injured, and directed courts to sentence the offender on conviction, to pay a fine to one, and damages to the other; the necessary consequence was, that by a principle of common-law, actions *qui-tam* would lie upon the statute, by which the public, and the party might proceed together, to punish the offender and recover damages: for this joining of the public and the party by the statute, is the ground of all actions on the statute. As it was the object of the statute that such offender should be arrested and holden in person for trial; which appears from the clause of the statute

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authorising such offender to be bound over to court, and as the offence is of such a nature as to justify an immediate arrest by warrant, the practice upon the statute was to proceed by information *qui-tam*, and arrest the offender in the same manner as in a criminal process.

Information *qui-tam* upon the statute against breaking the peace, must be in the name of the state, as well as in the name of the party complaining : it must be addressed to some assistant, or justice of the peace, the facts must be stated in the information, in the same manner as in a declaration for assault and battery ; it must conclude against the statute, entitled, an act against breaking the peace, or contrary to the form and effect of the statute, in such case made and provided ; and to the damage of the plaintiff such sum as he thinks proper to demand ; and the authority to whom the complaint is addressed, may issue a warrant, and the defendant may forthwith be apprehended, and brought before the authority to whom the complaint was made, or any proper authority for trial. If the damages demanded do not exceed the sum of four pounds, then the assistant or justice of the peace to whom such information is returned, may proceed to hear and try the same, and render judgment thereon ; but if the sum demanded exceed four pounds, then such court has no other cognizance of the case, than to enquire whether there is probable ground of action. If he find there is probable cause of action, he must recognize the defendant to appear before the next county court in the county ; but if he finds there is no probable cause of action, then he may dismiss the prosecution.

The general principles respecting informations *qui-tam* upon statutes, will be fully discussed when we come to treat of that species of remedy. This will be sufficient to illustrate what is peculiar to this remedy, as far as it respects the recovery of damages for assault and battery.

3. • As malicious, and evil minded persons, will sometimes commit assault and battery, in such a secret manner that the ordinary legal evidence cannot be obtained, the statute has calculated a remedy for such cases ; by which it is enacted, that if any person shall break the peace by secretly, assaulting, beating, maiming, wounding,

wounding, or hurting another, the person so assaulted and injured, making application and complaint to the next assistant or justice of the peace, shewing him what wounds or hurt he has received thereby ; such assistant or justice, shall forthwith grant out a writ to the sheriff of the county, or his deputy or constable of the town, where such assault shall be made, commanding them, or either of them, to arrest, and bring before him, such person so assaulting, to answer such complaint : who, upon oath being made against him of such assault, and of the wounds or bruises thereby received by the person assaulted and beaten, shall be bound in a sufficient bond, with sureties for his appearance at the next county court in that county, to answer to the complaint ; and in case of refusal to become bound, may be committed to the common goal, there to remain till the next session of the said county court.

And if the person so bound, or committed shall not on trial of the case, satisfy the court, that he was at some other place at the time, the said assault was made, and was not the person who gave it, he shall be adjudged guilty ; and shall be bound to pay the person assaulted, and injured, all such damages as he shall have sustained by such assault and beating ; or in case such damages cannot then be computed, the offender shall give bond with sufficient surety, or sureties, to pay all such damages as shall afterwards be awarded by said court at some future session, to which such case shall be continued, together with costs of prosecution ; and also to pay to the treasurer of the county, such fine as the said court shall order, not exceeding twenty pounds, and stand committed till such sentence shall be performed.

• In the case of Northrop against Brush and Isaacs, the complaint was, that the defendant Brush, invited Northrop to the coffee-house in New-Haven, into a private room under the pretence of business, and did there assault him with loaded pistols ; that the other defendant, Isaacs, did come into the room, and combine with Brush, and that they did further assault, and beat the plaintiff ; no other person being present.

The justice who bound over the defendants did not certify that the plaintiff was admitted to his oath, or had discovered his wounds

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and on a general demurrer three exceptions were taken, that it did not appear from the process, that the plaintiff ever charged the defendants under oath with facts complained of, or that he shewed his wounds to the justice, and that the assault complained of was committed in a public place by a plurality of persons, so that the plaintiff had sufficient remedy in the ordinary course of law, and had no occasion, nor right to recur, to the statutory mode of redress, which was only intended to give relief where from the nature of the transaction, ordinary proof could not be obtained. But the court determined that making oath to the facts and shewing the wounds to the justice, was proper evidence for the justice to proceed upon, and that it was to be presumed that this was done; but that it was unnecessary for him to set forth the evidence on which he proceeded, or if it was, that this must be taken advantage of under abatement; for the demurrer does not go to the form of the process, but the sufficiency of complaint; and that two persons might jointly commit a secret assault, if out of the presence, or view of others, and altho' the person assaulted may proceed against one in the common action of trespass, and take the other for a witness, yet he is not obliged to resort to that method, for one alone might be unable to pay the damages, and it might be unsafe for him to rest upon the testimony of a person, whose malignity had induced him, to join in a secret attack upon his person; and it is for the public peace that both assailants should be complained of, that they may be punished criminally.

Having described the several kinds of remedies for the injury of assault, and battery, I shall make some remarks upon the rule of estimating damages. The statute has furnished a most excellent rule for this purpose; that damages shall be given, and a fine inflicted, according to the merit of the offence, as shall be judged just and reasonable, upon consideration of the parties, the instrument, the danger, the time, place, and provocation. In the estimation of damages the characters of the parties are taken into view with the greatest propriety. A man of honor and respectability, will be entitled to much larger damages than a worthless, unfeeling fellow, because his sensibility will be much more wounded; and in that proportion, damages ought to be estimated: for there are many persons whose feelings are such, that they would estimate the injury of a battery, merely by the degree of bodily pain they experienced.

enced ; while others, disregarding the pain of body, would feel the keenest indignation, and resentment, for the indignity, insults, and affront which they suffered. The injury may be aggravated by the nature of the instrument,—as if it be such as exposes the life of a person ; by the danger of the attack ; and the degree of the wounds, and by the time and place, as if it be in some public place, when people are assembled upon some public occasion ; or when a person is in the performance of some public duty. Provocation can never wholly excuse an assault, because words can never justify blows ; but this may operate greatly in mitigation of damages. If a person should by abuse and insult, provoke the resentment, and wound the feelings of another to that degree, that the person abused, impelled by the sudden impulse of passion, should instantly avenge the insult, by striking him, he would be entitled to recover but a very small sum in damages. For allowance must be made for the feelings of human nature ; and the man who makes use of such intolerable abuse and provocation, deserves but little compensation for an injury which originated from his own misconduct ; and in such cases a jury ought never to give a verdict for such damages as will carry the cost. Damages may be also lessened by the consideration of a provocation arising not only from the abuse of myself, but of my father, son, or my friend : and in such cases the keen indignation which a man of honor and spirits will feel for the insult offered to his relations or friends, must be highly applauded, and ought greatly to diminish the damages. No insult will more strongly excite the indignation of a man of feeling, than abusing and defaming his parents ; and the man who is capable of insulting the father in the presence of the son, merely to provoke the son, must be a stranger to every generous sentiment, and his heart must be wound up to the highest pitch of malignity and brutality.

In the estimation of damages, we must consider whether the battery was the immediate effect of the provocation ; or whether after the passions had time to subside, it be a cool deliberate act of revenge. If a person be abused by another out of his presence, and then instead of appealing to the law for justice, he should become the avenger of his own wrong, in the hour of mature deliberation, it must have far less effect in the mitigation of damages, than where

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the battery is to be considered as the instantaneous and irresistible effect of the provocation ; for we are not to encourage mankind in the practice of appealing to their own arms to avenge their wrongs ; but only to excuse it where it is prompted by the ardor of those noble feelings which ought never to be eradicated from the human heart.

But the greatest object of the law must be to prevent personal violence in every instance ; for it not only disturbs the public peace, but must be acknowledged to be a very unfair and unequal mode of deciding controversies. It is not he who has the justest cause, but he who has the strongest arm that gains the victory.

Damages ought so to be calculated, as to discourage provocation on one hand, and assault and battery on the other. But where a person assaults and beats another without any just cause or provocation, especially if he be a man of respectable character, then not only heavy, but also exemplary damages ought to be given. For as the preservation of our persons from violence is an object of the highest importance to society, and as no man of sensibility would suffer it for any pecuniary consideration, it is necessary such high damages should be given, that the example may operate upon mankind, to deter them from practices that are destructive of public peace, and private happiness. It is a pleasing consideration which exhibits a promising prospect, that the growing mildness of the manners of the people render it rarely necessary for an action of assault and battery to disgrace our courts.

II. I proceed to consider the injuries that affect a man's health, and the modes of redress.

• If a physician or surgeon undertake the cure of any wound or disease, and by neglect or ignorance, the person is not cured, or materially injured in his health, he may recover damages for such injury. For it is a settled principle that bad practice is an injury at common law, whether it be for curiosity and experiment, or by neglect ; because it breaks the trust which the party had placed in the physician, and tends to the destruction of the patient : but this rule is confined to surgeons and physicians, who make a public profession

of the business; for otherwise it is the plaintiff's own folly to trust to an unskillful person, unless such person expressly undertook the cure.

a Any deviation from the established mode of practice, shall be deemed sufficient to charge a surgeon in case of an injury arising to the patient, and upon this ground an action was adjudged to lie against the surgeon and apothecary, for breaking the callous of the plaintiff's leg, after it had been set. It appearing that it was done unskillfully, and out of the common course of practice, and for the sake of making an experiment with a new instrument.

b If the health of a person is impaired in consequence of the act of another, as selling him bad wine, which injures his health, action will lie. So for exercising a noisome trade in the neighbourhood, which produces the same effects. As where an action was brought for erecting a brew-house, and burning sea-coal by which the air was infected. So for erecting a tallow-furnace to the annoyance by the smell of the plaintiff's house and family. c So also for a slaughter-house.

These injuries are unaccompanied with force, and are the necessary consequence of some tortious act, or some culpable omission. To recover damages for them, actions of trespass on the case will lie. For such injuries the remedy was devised in consequence of the statute of Westminster the second, as I have already mentioned, but which have never been classed under one head, so as to assume a specific name: they are therefore called by the name of actions of trespass on the case. For as there is no particular form prescribed and settled for redressing these injuries, every man has a right to state his whole cause of complaint at length; and if by the general principles of law he is entitled to relief, his action is maintainable.

III. We proceed to consider the injuries that affect a man's reputation, and the modes of redress.

A man's reputation may be affected by slander. This is defined to be the defaming a man in his reputation, by speaking, or writing words concerning him, falsely and maliciously, by which he sustains

a 2 Will. 359. b Rol. Abr. 90. Hutt. 133. Cio. Car. 310. c Devotion vs. Tracy, Sup. C. 1794.

injury in character or in property. Slander may be committed by words, or by writing, pictures and signs; which are called libels, I shall first consider slander by words, and then consider libels.

1. Slander by words may be where the words are in their nature actionable, and where they are actionable by reason of some special damage arising from them.

1. Words are actionable in themselves which charge, or import the charge of some crime, and which bring him in danger of some legal punishment.

• To make words actionable, it is not necessary that they charge a crime which endangers a person's life; but to charge a person with any crime for which he is liable to a prosecution, is actionable. The words must charge a fact to have been committed; for to charge a man with bad or evil intentions, is not sufficient. • As where the defendant said of the plaintiff, he is a brawler and quarreller, and gave his champion counsel to kill men, and then fly the country; these words were adjudged not to be actionable, for they charge no fact committed, and the purposes and intentions of a man without action, are not punishable by law. • So where the words were, he is a troublesome fellow, and I doubt not to see him indicted at the next assizes for sheep-stealing. These words were adjudged not to be actionable, as not charging the party with any fact committed,

• But it is not necessary that the words explicitly express a charge of a crime; it is sufficient if they import or imply such a charge. To say that a man was put in the round-house for stealing ducks at Crowland, was, after verdict on a motion in arrest of judgment, held to be actionable, because the words imported a charge of stealing, and the jury had found them to be false and malicious. • So where upon a colloquium or conversation of the death of a certain person, the words were, you are a bad man, and I am thoroughly convinced that you are guilty, (meaning guilty of the murder of such person) and rather than you should want a hangman, I will be your executioner: because the word guilty, implies a malicious intent, and can only be applied to something which is universally allowed to be a crime; and the subsequent words, rather than

• 1 Espin. Digest. 229. Finch's Law, 186. • 4 Coke 16. b. • 1 Burr. 180. d 2 Wils. 300. • Coop. 276.

that you shall want a hangman, I will be your executioner, clearly shew what species of death the defendant meant, and manifestly import of a charge of murder. But to say that a man is the cause of the death of another is not actionable, because a man may innocently be the cause of another's death. So where the defendant said to the plaintiff, I know you very well, how did your husband die? The plaintiff answered, as you may if it please God. The defendant answered no, he died of a wound you gave him. After verdict, the words were held to be actionable, because from the whole frame of them, they were spoken by way of imputation.

It is necessary that slander should be taken by the implication of words, otherwise it would be in the power of any man to slander whom he pleased indirectly, and he could never be compelled to pay damages for the injury.

Adjective words are actionable according as they presume an act committed, or not. To say of a man that he is a perjured knave, is actionable, because the word perjured imports that the act of perjury had been committed; but to say that a man is a thievish or seditious knave, is not actionable, for these words only import an inclination to sedition and theft, not that the party was ever guilty of either.

Though the words might import the charge of a crime, yet if it appears that the facts charged could not have happened, this action will not lie, as where the plaintiff declared that the defendant having a wife then living, said of the plaintiff, he has killed my wife, he is a traitor; it was held on demurrer that the words were not actionable, because the wife being living, the crime could not have been committed, and therefore the plaintiff could never be brought into danger. But the principle on which words charging crimes are actionable, is said to be because the person slandered is thereby exposed to a criminal prosecution; yet words that falsely charge a person with the commission of a crime for which it is said he has once been punished, and so not liable to be again punished, may be actionable; and by the same reason words charging the commission of a crime a prosecution for which is barred by the statute of limitations are actionable: otherwise mankind can defame each other

other with impunity. The case already mentioned of charging a person with being put in the round house for stealing ducks at Crowland, comes within this description—for the words themselves shew the punishment. *a* So an action lies for saying of a man that he was whipped for stealing sheep, for the words amount to a charge that he was convicted of sheep stealing.

*b* It has been adjudged that words charging a crime to have been committed, tho' at such time that a prosecution would be barred by the statute of limitation, are actionable.

Words are actionable where the speaker repeats a story told him by some other person, such words being actionable. It was formerly the practice to aver that such person never told such story; as where a woman brought an action against a man, for saying that another had reported that he had had the use of her body, it was occurred that such person had never reported such story.—*d* But in a modern case upon motion in arrest of judgment, the words, "Thou art a sheep stealing rogue, and farmer Parker told me so," were held actionable, tho' it was not averred that farmer Parker did not tell the defendant; because this was not material.

2. Words are actionable in themselves which operate to exclude a man from society. *c* As to say of a man that he is a leper, or hath got the leprosy, is actionable, for a leper shall be removed from society. *f* So are the words that a man is full of the pox, I marvel you will eat with him. But the words must charge the person with having such disorder at the time of speaking the words, for if not, the words do not operate to exclude the person from society. *g* As she has given the bad disorder to several is not actionable, as not spoken in the present tense.

3. Words are in themselves actionable which injure a man in his trade; or profession. These are such as charge a want of honesty, and ability. *b* As to say of a physician, that he is an empirick, quack, or mountebank—or that he has killed a patient with his physic—*i* of a lawyer that he is a knave, dunce, cheat, rogue, barrator, or extortioner; *k* so to say of an attorney, "what does he pretend to be a lawyer! he is no more a lawyer than a devil," is actionable.

*a* 1 Roll. 50. *b* Webb vs. Fitch, Sup. C. 1793. *c* Cro. Jac. 162. *d* Sayer 266. *e* 1 Roll. Ab. 44. *f* Hob. 219. *g* 4 Cok. 17. *h* 1 Roll. Ab. 54. *i* 5 Bac. Ab. 492. *k* 3 Will. 59.

- So if one says of a merchant he is a bankruptly knave, or that he will be a bankrupt in two days, or such like insinuation, these words are actionable. So are the words, "he is a sorrowful pitiful fellow, and a rogue, and compounded his debts at five shillings in the pound—or he is a pitiful fellow, and cannot pay his debts—he is a cheating knave—a bankrupt knave—a bankrupt—he is not able to pay six pence in the pound to his creditors," and the like.

• When words are used to any person which are applicable to his profession or calling, and tend to scandalize it, they shall be taken as applying to it, and be actionable; as where one said to an attorney, or clerk of the king's bench, who was sworn to deal without corruption, speaking of the manner of his dealing in his profession; you are well known to be a corrupt man, and deal corruptly. These words were adjudged to be actionable, as scandalizing him in his profession, to which the words referred; for words relating to a person shall be understood of the condition of the person.

4. Words are in themselves actionable which are spoken in derogation of a person in any office of dignity, trust, or profit. Such words are actionable in respect of these persons which would not be held so in the case of a common person. To say of a judge that he has rendered a false, or corrupt judgment; or that he has but one ear, intimating that he hears but one side of a cause, is actionable. To say of a justice of the peace—that he is a common barrator, *f* a false justice, *g* a forsworn justice, *h* a half-ear'd justice, and will hear but one side—or that he covereth, and hideth felonies, and is not fit to be a justice—or that he is a rascal, villain, and liar, are actionable words. But to say of a justice, that he is an ass, and a beetle-headed justice, is not actionable, because these words only imply a want of ability. So when the words do not charge a person in such trust, or office with any breach of his duty, or oath, with any crime, or misdemeanor, whereby he has suffered any temporal loss in his fortune, office, or in any way whatever, but are spoken as matter of opinion, as to such persons conduct, such words are not actionable. As where

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*a* 5 Bac. Abr. 493. *494.* *b* 4 Coke, 16. *c* Cro. Eliz. 305. *d* Hutt. 197.  
*e* Hob. 140. *f* Cro. Eliz. 358. *g* 1 Lev. 280. *h* Cro. Car. 223. *i* 4. Rep. 26.  
*k* 8 Mod. 270. *l* 3 Bul. 696. *m* 3 Wils. 477.



the plaintiff being a knight of the shire in the county of Surry in England, the defendant at a meeting of the freeholders, of the county used the following words: "As to Mr. Onslow you might as well instruct the wind, and should he promise his assistance, I should not expect it." These words were held not to be actionable, as charging no crime, but being merely matter of opinion—and to impute to any man the mere defect of moral virtue, moral duty, or obligation, which render a man obnoxious, is not actionable.

Words not actionable in themselves may become so by reason of some special damage—for wherever a person publishes a false report respecting another, by which he sustains temporal damages, he is liable to an action. Such are the loss of preferment, marriage, business, or service.

*a* To call a divine a heretic, by which he loses a preferment, is actionable. *b* So where the defendant said of the plaintiff (who was son and heir to his father) that he was a bastard—an action was adjudged to lie, for it tended to disinherit him of the lands which would descend to him from his father; but it was further resolved that if the defendant pretended that the plaintiff was a bastard and he himself the next heir, no action lies, for it is a claim of right. *c* And in such cases it is not necessary that the damage arising from the words be certain and immediate, for if it be probable and remote, it will maintain the action.

*d* To say of a woman that she is unchaste, that she has had a child, or any thing prejudicial to her character, by which she sustains a loss of marriage is actionable. The same general rule applies to men.

*e* Words by which a man sustains a loss in his trade or business, are actionable. As where the plaintiff declared that he was an innkeeper, and the defendant said to him, thy house is infected of the pox, and thy wife was laid of the pox, was held to be actionable, for it was discredit to his house, and guests would not resort thither. *f* But in such cases it must appear that the words from whence the injury arises were used in a conversation concerning the plaintiff's

*a* 4 Co. 17 *a*. *b* Idem. *c* Cro. Car. 213. *d* 4 Co. 16. *e* Cro. Eliz. 289. *f* Salk. 694.

plaintiff's trade and business. • But where the words must clearly refer to the plaintiff's trade or calling, they shall be actionable, tho' no colloquium or conversation is found.

• If a person to prevent a servant from getting a place, gives him a false character, it is actionable; but in such cases it must appear to have been given maliciously, and with an ill intention, for tho the character given is false, yet if no malice appear, the action will not lie. • So if the words are spoken privately, and in confidence. As where a servant brought her action against a former mistress, for saying to a person who came to enquire her character, that she was saucy, and impertinent, and often lay out of her own bed; but that she was a clean girl and did her work well. Tho the plaintiff proved that she was prevented by this from getting a place, yet this is not to be considered as an action in the common way for defamation by words, but the gist of it must be the malice which is not implied from the occasion of speaking, but must be expressly proved. This was a confidential declaration, and ought not to have been disclosed.

I shall now consider the construction of words, innuendos, averments, justification of words, and special damage.

• 1. The old rule of the construction of words was, that they were always to be taken in the milder sense, but this is now exploded, and the rule is that they shall be taken in that sense in which they would be understood by those who heard them. • All the sentence must be taken together, for tho part of the words may be actionable, yet they may be so explained by the rest, as not to bear an action. As if one should call another a perjured knave, yet in the same sentence, if he so expresses himself, that it cannot be applied to perjury in a court of law, but merely to uttering a falsehood, the subsequent words explain the former, and they therefore are not actionable.

• Where words are spoken which bear an imputation of slander, or with an intention to defame, the court will not strain to find an innocent meaning for them. As where the defendant said to the plaintiff, how did your husband die? The plaintiff answered, as you may, if it please God. The defendant replied no, he died

• 2 Lev. 62. • Bul. N. P. 8. • Idem. 2 Espin. 237. • Bul. N. P. 4.  
• 4 Co. 19. • Gil. Repr 243.

of a wound you gave him. On not guilty pleaded, the plaintiff had a verdict, when it was moved in arrest of judgment, that the words might have an innocent meaning; as that the stroke might have been given by accident; but the court said that the words bore a scandalous meaning, and that they would not endeavour to find out how they might be spoken with an innocent meaning.

c So on the other hand, courts will not put a forced construction of guilt, on words which may bear an innocent meaning. As where these words were spoken of an attorney—He is a common maintainer of suits—they were held not to be actionable, for to maintain suits is his business, and the words shall not be construed to import of charge of maintenance, when applied to him. d The words should import a direct charge of a scandalous nature, and not by inference or conclusion. As where the words were, Mr. Stanhope hath but one manor, and that he got by swearing and forswearing. These words were held not actionable, because they were too general, and because they did not charge the plaintiff with swearing and forswearing; for he might have got the manor so, and not be privy to the swearing and forswearing.

e The person slandered must be always certain, so that there can be no doubt as to the person meant. As if one say—that one of the servants of a certain person (he having many) is a notorious felon or traitor. No action lies, on account of the uncertainty of the person; but if once a person is named, and then conversing about him, one says that he is a notorious thief, this is actionable: for the person may be sufficiently ascertained by the innuendo, which in the former case could not be done.

f When words are used with an intention to slander, though the offence which the defendant intended to lay to the plaintiff's charge is improperly expressed, yet may the words be actionable. As where the defendant said of the plaintiff, Faustus has hired several persons to make false powers to receive seamen's wages. This was construed to convey a charge of forgery, and to be actionable, tho the word powers is general, and may not properly mean letters of attorney, yet being so used in common speech, it shall be construed as intending to defame.

2. When

a Hob. 116. b 4 Co. 15. c 4 Co. 17. d Gil. Rep. 216.

9. When the words or sentence do not of themselves contain a charge of a slanderous nature, without words of reference, or explanatory of the meaning or application, it may be supplied by proper innuendos in the declaration, as to matters or persons referred to. But the office of the innuendo being to supply the absence of something necessary to complete the sentence, and shew the application of the words; it can never be admitted to extend their meaning beyond the import of the words themselves; as for where the words were, "Master Barham did burn my barn," with an innuendo, a barn full of corn, which is felony if there be corn in it, or it be parcel of the dwelling-house. The court would not suffer the innuendo to imply that there was corn in it, when the word itself would not bear so extensive a meaning.

b So where the person is uncertain, an innuendo shall not make him certain. As if one says, "I know one near or about a certain person who is a notorious thief." The person really meant cannot be supplied by an innuendo, when there has been no previous conversation about him. For the office of the innuendo is to ascertain and designate the person who was named in certain before, and stands in the place of an aforesaid. And therefore without something to refer to, cannot be made certain: for it would be inconvenient that actions might be maintained by imagination of an intent, which does not appear by the words on which the action is founded, but which is uncertain and subject to deceivable conjecture.

So neither shall the words if used generally, be extended by the innuendo in the declaration to apply to any particular thing, so as to induce guilt from thence; as where the words were, "He forged a warrant, innuendo a certain warrant by which the sheriff was commanded to take some particular person. It was held that the innuendo could not specify in such a general manner, what was generally alledged.

3. c Averment is where the words for which the action is brought are only criminal by reference to some other fact, which therefore constitutes the ground of the action, or is necessary to maintain it; in such case this matter must be expressly averred in the declaration. As in the case of traders, certain words are actionable

when

a 4 Co. 20. a Cro. Eliz. 428. b 2 Espin. Dig. 244. c 4 Co. 276  
d Hob. 2. 45. e 2 Espin. Dig. 255.

when applied to them, which are not so when used to others : as to call one a bankrupt. In such case it is necessary to aver a colloquium or conversation concerning such person as a trader, and that the words were used with that application.

Where the words charge a crime, which words are of themselves actionable, it seems that in such case an averment that the crime was committed, is not necessary.

\* In an action by a trader for actionable words, he must aver that he was a trader, and used the trade, and that he gained his living by buying and selling, and that at the time of the words spoken he was a trader. The same general rule applies to all professions—as lawyers and physicians. <sup>b</sup> The plaintiff need not aver in his declaration that the words or charge was not true, for that is supplied by the general allegation in the declaration, that the defendant spoke them falsely and maliciously.

4. The defendant, under the general issue of not guilty, may not only deny that he ever spoke the words, but may justify the words on several principles.

\* He may justify because the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question ; or that he was a witness, and testified to what was proper in the cause ; for if either counsel or witnesses speak slanderous words about another, which are foreign to the case in question, they are answerable for it in an action ; or that they were spoken in the legislature, or some public body. So they may justify speaking them through concern, or the reading them as a story out of a history, or he may shew from the dialogue that they were spoken in a sense not defamatory. <sup>d</sup> As if the words were spoken out of motives of friendship, without any intention to defame—as where the action was for saying of the plaintiff, who was a tradesman, He cannot stand it long, he will be a bankrupt soon ; and special damage was laid in the declaration, that one Lane refused to trust the plaintiff for a horse : Lane, the person named, was the only witness called for the plaintiff, and it appearing from his evidence that the words were not spoken maliciously, but in confidence, and

<sup>a</sup> Hutt. 49. <sup>1</sup> Sid. 299. Cro. Eliz. 794. <sup>b</sup> Bul. N. P. 8. <sup>c</sup> Cro. Jac. 91. out  
<sup>d</sup> Bul. N. P. 8.

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out of friendship to Lane, and only by way of friendly warning not to trust the plaintiff for the horse : It was held, tho the words were actionable of themselves, yet as they were not spoken out of malice, but out of friendship, they could not be deemed slander.

a The defendant may justify by shewing the application of the words used not to be slanderous, tho they would otherwise, import slander. As where the words were for calling the plaintiff murderer, the defendant may shew that it was in a conversation concerning the killing of hares, of which the plaintiff having said that he had killed so many, that the defendant then said he was a murderer, but meant of hares.

b It is no justification of slanderous words that the defendant heard them of another person, for every one is answerable for the slander which he himself propagates of another. As where action was brought by the captain of a ship against a merchant at Bristol, for saying, that his vessel was seized, and he put into prison for smuggling corn. It was held that proof of the defendant's having heard it read out of a letter, and that he only reported the story, was no justification, but that he was answerable for the reports which he propagated.

c So it is no justification of slanderous words, that the defendant suspecting the plaintiff to have been guilty of the fact concerning which the words were spoken, had so used them concerning him. d The defendant may justify the speaking the words by proving them to be true ; for so it is a damage without an injury.

5. e Tho the words are in themselves actionable, the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration. But after he has proved the words as laid, he may give evidence of other expressions used by the defendant, as a proof of his ill-will towards him. f For in such case of words actionable, whatever special damage is laid, the plaintiff may go into evidence of it, but no more.

g If the plaintiff declares for words not actionable, and lays special damage, if the plaintiff does not prove the special damage laid

in

a 4 Co. 13. b.  
b Bull. N. P. 7.

c Bull. N. P. 10.  
d 1 Stran. 666.

e Cro. Car. 38.  
f Bul. N. P. 6.

g 5 Co. 125 b

in the declaration, he must fail, because special damage is the gist of the action. But where the words are themselves actionable, and special damage is also laid, if the words be proved, the jury must find for the plaintiff, tho' the special damage be not proved.—  
 • Where special damage is laid, the evidence must correspond with it. • It was formerly held that the plaintiff was bound to prove the words precisely as laid, but that strictness is now laid aside, and it is sufficient to prove the substance of them. But the sense as well as the manner of speaking them, must be the same: as where the words were laid in the third person. He deserves to be hanged for a note he forged. Proof that the words were used in the second person. "You deserve to be hanged," was held not to support the declaration; for there is a difference between words spoken in a passion to a man's face, and spoken deliberately behind his back: the first being more excusable.

But tho' two persons say the same words, an action will not lie against them jointly; for the slander of one is not the slander of the other.

• Where some of the words are not actionable, and a general verdict for the plaintiff is found with damages, this is no ground of arrest. • So if there are several courts, and the words in some are actionable, and in some not, and a general verdict is found, it is good: for if any of the courts are sufficient, the plaintiff must have judgment.

The action that is brought for these injuries, is called an action of trespass on the case, commonly called an action of slander.

II. We proceed to consider libels, or slander by writing. • Slander by libel differs from slander by words in this respect only, that it is delivered in writing or printing. But the offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity from its being done premeditatedly. The rules therefore laid down in the case of slander by words, will be found equally to apply to libels.

To charge a person with any crime which may subject him to the danger of legal punishment, is a libel, and actionable. As to charge

• 2 Ld. Raym. 1007. • 1 Roll. Abr. 218. Bull. N. P. 5. • Lewis vs. Niles, Sup. C. 1791. • Lewis vs. Niles, S. C. 1792. • 2 Espin. Dig. 240.

Charge a person with sodomitical practices. To alledge any matter which may exclude him from society. *a* As where the plaintiff brought his action against the defendant for a libel, charging him with having the itch, and stinking of brimstone—the plaintiff recovered, as the words charged him with a disease that rendered him ridiculous, and unfit for society.

*b* So where the libel is such, that it will injure a man in his trade or profession, action lies. *c* So where the writing injures the domestic peace and happiness of a family, charging a man's children with immorality or incontinence. *d* But nothing shall be construed a libel, which is necessary in the course of legal proceedings, and is relevant to the matter that comes before the court. *e* But tho the defendant may in such case be justified, yet if he does not confine himself to legal form, but charges crimes not properly cognizable by that jurisdiction to which he applies, an action will lie.

No matter which is stated in any memorial, or petition, for the redress of grievances, and addressed in the proper channel, by which such relief may be had, that is to the persons only, who have power to give such relief, shall be deemed libellous.

*f* As words spoken without any intention to be made public, as in confidence or privately, are not actionable: so if a person in a private letter expostulates with another on his vices, it is no libel.

*g* A defamatory writing expressing only the initials, or one or two letters of a persons name, but in such a manner as obviously, and indubitably referring to the person, and so that it would be nonsense if strained to any other meaning, it is as properly a libel as if the whole name had been mentioned at large; for it would bring the utmost contempt on the law, to suffer its justice to be eluded by such trifling evasions; and that a writing understood by the meanest capacity, could not be so by the court and jury. A writing tho' with feigned names has been construed a libel.

*h* A writing tho' not directly charging crimes may be a libel, as if done in a taunting ironical manner. As after recounting any acts of public charity by the person, to say, "you will not play

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the

*a* 2 Will. 403 *b* 2 Strang. 898. *c* 2 Burr. 920. *d* 1 Sess. 131. *e* 4 Co. 146. Cro. Eliz. 230. *f* 2 Brownl. 151. *g* Hawk. P. C. 194. *h* Aik 470  
*b* Hob. 215.



the jew, or hypocrite" and so go on in a strain of ridicule to insinuate what he did proceeded from vain glory.

a It is not material by the common law whether the libel be true or false, or whether the party against whom it is levelled be of good, or evil fame; for the party grieved ought to complain for every injury done to him in the ordinary course of law; and not have recourse to methods of redress by slanderous publications.

b The slanderous writing must be published to make it a libel. The author, or publisher of a libel must be the contriver, or the procurer of the contriving it; or the malicious publisher of it, knowing it to be a libel. For if one reads, or hears a libel read, it is no publication—but if after hearing, or reading it, he repeats, or reads it, to others it is a publication. If a man writes a libel dictated to him by another, he is guilty of making it. Publication must be by delivering or handing it about, or by reading, and singing it, in the presence of others. Repeating a part in merriment without malice was held not to be a publication. But singing a song in ridicule, or slanderous the persons character was deemed a sufficient publication.

c In setting out words, or the tenor of words in the declaration, there is a difference between words spoken, and words written.—Of words spoken there cannot be a tenor, for there is no original to compare them to, as in the case of words written. Therefore in the declaration for words spoken variance in the omission or addition of a word is not material—it is sufficient if so many be proved or found as are actionable—but it is otherwise in the case of words written—for tho in describing a libel or other writing, there are two ways of pleading, that is by saying, *according to the following tenor in these words*; or *by the sense*—if you declare on the words themselves, any variance, or mistake is fatal—for tenor means a transcript, or true copy. But in declaring on the sense such an adherence is not required, and a variance is not fatal. Therefore where the declaration was for a libel according to the following tenor, and in setting out the sentence, *nor* was inserted for *not*, tho' the sense remained the same, the variance was held to be fatal.

d As it is essential to a libel that it be published, it must appear

a 5 Co. 125. 5.    b 2 Espin. Dig. 249. 9 Co. 59. d.    c Salk. 662.  
d 2 B. & C. Rep. 1037.

pear from the declaration—but that word is not necessary, any other word of the same import is sufficient, as printing in a newspaper.

a Libels may be pictures, raising a gallows before a man's door, hanging him in effigy, and such like.

But as to signs, and pictures, it seems necessary to shew by proper innuendoes, and averments, the defendant's meaning, that they particularly applied to the plaintiff, and that some special damage has followed.

In addition to the injuries already described, there are others which affect the right of personal security, which cannot be classed under any of the foregoing heads, and which will particularly be considered by themselves. Such are the injuries arising from a conspiracy and malicious prosecution, for which actions of trespass on the case will lie. The former being called an action on the case in the nature of a conspiracy, and the latter action having assumed the name of malicious prosecution. We shall first consider the injury of conspiracy, 2d. of malicious prosecution, 3d. the declaration and proof—and 4th. the defence to be made by the defendant in such actions.

#### 1. Of actions of the case in the nature of a conspiracy.

§ An action on the case in the nature of a conspiracy lies where two or more combine for the purpose of preferring indictments, charging crimes against any one, without foundation, or otherwise conspiring to prejudice a man wrongfully, either in person, fame, or property.

c There are four incidents to a conspiracy. 1. It ought to be disclosed by some manner of prosecution, or by making of bonds or promises to one another. 2. It ought to be malicious for unjust revenge. 3. It ought to be false, against the innocent. 4. It ought to be out of court voluntarily.

But there is a distinction between an action of conspiracy properly so called, and an indictment for a conspiracy. An action of conspiracy, properly so called, lies not, unless the party has been indicted, and acquitted in a lawful manner; but it seems that an indictment

a 4 Co. 125. 3 Blac. Com. 126. b 2 Esp. Dig. 278. Finch's law, 305.  
c 9 Co. 55 b. d 9 Co. 56 b.

indictment for a conspiracy will lie where there has been a false conspiracy among many, tho nothing has been put into execution,

• So there is a difference between an action of conspiracy, and an action on the case, in the nature of a conspiracy. For if an action of conspiracy is against two, or more, if all but one are acquitted, judgment shall not go against him; but where the action is on the case, in the nature of conspiracy, against two, or more, then one only may be found guilty. For this is an action of the case founded on a tort done by two or more persons, in which the plaintiff is not bound to prove the whole matter laid in the declaration, and this distinction is taken between actions of the case founded on a contract and on a tort: in the first the whole contract must be proved, in the latter so much will do as proves the plaintiff had a good cause of action.

• And this is in fact an action for a malicious prosecution, with this difference only, that an action for a malicious prosecution may be brought against one only, but an action on the case in the nature of a conspiracy, must be brought against more than one, or against one charging, that he, together with others, had conspired to indict the plaintiff, or charge him with a crime: the grounds of the action therefore are the same,

• Where an action on the case in nature of a conspiracy, was brought against the defendants for causing the plaintiff to be arrested, and held to bail where there was no cause of action, the plaintiff recovered. • So, tho the bill of indictment has been found not a true bill, yet an action will lie for the conspiracy.

2. The action of malicious prosecution, is an action whereby damages are recovered for any action against, or prosecution of any one, either by suit, indictment, or other legal process, where such action, or prosecution appears to arise from any corrupt motive, and to be without any ground or cause for the same. This action lies as well for a groundless civil suit, as for a criminal prosecution. • But it does not lie against a person merely for bringing an action without any ground, because it is a claim of right, and he is liable for costs,

If

• 1 Wilson, 210. • Cro. Cas. 173. • Vent. 11. • Hytt. 49. • Salk. 28.

• If a person for the purpose of vexation, and holding another in custody sues him for a greater sum than is really due, this action lies. As where a person upon a debt of forty pounds, for the purpose of holding the debtor to excessive bail, and keeping him in goal, sued out a writ, and held to bail for five thousand pounds, in consequence of which he was several days detained in goal, an action was sustained for the special injury.

• Where there is a good cause of action as debt due, if a person without the knowledge or direction of the person to whom the money is due, sues out a writ, and arrests the body of the debtor, he may maintain this action against such person, for he was not liable to be sued by him. The same rule must apply in cases of a summons, as well as attachment, where one sues in the name of another without authority,

• Where there is a good cause of action, yet if the plaintiff sues in a court that has not cognizance of the cause, this action lies; but in such case it ought to be averred in the declaration that the defendant knew that the court had not jurisdiction, and that he brought the action maliciously,

Though the action be brought in a proper court, yet this action may be maintained, if the suit or proceeding is utterly without ground, and that known to the person himself, by reason of the undue vexation and damage to the plaintiff. As where a person brings a second action for the same thing, the first having been determined.

• It is not necessary that the first action should have been actually heard, tried and determined in the defendant's favour, for this action equally lies for any groundless proceeding whatever. As if a person attaches another and holds him to bail, or procures him to be imprisoned; and then knowing he has no probable cause of action, does not appear in the action, or suffers himself to be nonsuited, this action will lie.

• But when this action is brought on the ground of a former civil suit, having been commenced against the plaintiff, it is to be observed, that this action must not be brought till the former ac-

tion

• 2 Sid. 424. • Salk. 14. • 2 Will. 303. • Bull. N. P. 13. • Idem.

tion is determined, because till then it cannot appear that the first action was unjust; for it must appear not only that a thing has been done which is wrong, but that damage has arisen, or is inevitable.

This action lies for the malicious preferring an indictment, information, or presentment against any person for a crime.

• If a man is indicted for any crime that may injure his reputation or fame, he may have this action, for he is falsely scandalized by the malice of the prosecutor, and this is a damage for which the law gives an action. If a man is prosecuted for any offence, that subjects him to peril of life or liberty, or for which he may be punished, he may bring this action, for he is endangered in that respect, and receives a damage. If a man be falsely and maliciously indicted, tho it neither touches his fame or liberty, yet may he have this action, for the expence and injury to his property in defending himself on the indictment.

• This action will lie, tho the indictment or information is so bad that the party cannot be convicted upon it. • So if the grand jury find not a true bill, or if the authority to whom complaint or information is made, should on examination find the evidence insufficient to justify the binding over the prosecuted to a court, having final jurisdiction. • The general rule by which these actions are governed is, that the plaintiff must shew malice in the defendant, and want of probable cause, and both must concur. But from the want of a probable cause, malice may be, and is most commonly inferred; but from the most express malice, a want of probable cause can not be implied.

### 3. We proceed to consider the declaration and the proof.

• As this action is founded on an injury received from a groundless and malicious suit or prosecution, it therefore must appear to the court to have been groundless. The declaration therefore must always state that the suit or prosecution had been decided in favor of the plaintiff, for from the acquittal or discharge, the presumption is in favour of the plaintiff's innocence, and till acquittal it cannot appear that the first was unjust. Therefore if the declaration

does  
• 1 Sil. 13. • 1 Stran. 691. • Cro. Jac. 400. • 4 Burrows, 1974.  
• 2 Esp. Digest. 230. Bull. N. P. 14.

does not shew how the suits of prosecution were disposed of, and that they are ended; it is ill.

a By the common law of England, in all cases of an action for maliciously indicting the plaintiff of a felony, of which he was acquitted, there must be a copy of the record and acquittal from the court where the trial was had, and which must be granted by that court, and produced in evidence : and the granting of such copy is matter of discretion with the court ; but here our courts can exercise no such discretion ; and every person has a common right to such copies of record, attested by the clerk of the court, as are necessary to prove his cause, and which are sufficient in all cases, tho not granted by the court, and must be produced by the plaintiff in the action, for the purpose of proving every thing respecting the prosecution appearing on record.

The plaintiff may produce witnesses to shew his innocence, and that there was no probable cause, and every circumstance that shews malice in the defendant ; as where the plaintiff was allowed to give in evidence advertisements put into the papers by the defendant, mentioning that the indictment had been found against him, and other scandalous matters, not to encrease the damages, but to prove the malice.

b In case of conspiracy, the actual meeting of the defendants, and conspiring together, need not be expressly proved, but may be collected from collateral circumstances.

4. As to the defence that may be made by the defendant, it may be remarked, that as to support this action there must be both malice and a want of probable cause ; tho express malice be proved, yet if the defendant can prove a probable cause, he shall have a verdict. The defendant therefore may produce witnesses to prove the guilt, or the probability of the guilt of the plaintiff, the circumstance that appeared against him, and induced him to believe him to be guilty : so he may produce evidence by any collateral circumstances, to satisfy a jury, that he had no malice, tho there was no probable ground of prosecution.

Tho an action will lie for a malicious prosecution, yet it is not  
to

to be favoured ; therefore if the indictment has been found by the grand-jury, or there is a binding over by the court, the defendant shall not be obliged to prove a probable cause.

In England we find no actions for malicious prosecutions brought against grand-jurors ; for there single grand-jurors present no informations ; and the grand-jury when summoned to attend on the proper courts, find such indictments as are laid before them for all crimes, and present them to the court ; but here, as in all cases of crimes not capital, single grand-jurors may make presentment to single ministers of justice, at any time, and to courts when they are sitting, we find that grand-jurors have been the objects of this action. The same general rule applies to them as to a person who procures one to be prosecuted maliciously, and without probable cause. It seems to be reasonable that where an informing officer will deviate from his duty, and prostitute the authority of his office to sinister purposes, and to the gratification of personal resentment, that he should be severely punished ; for no man ought to be protected by virtue of his office, only while he acts conformable to the duty of it. Yet we ought to be cautious in sustaining prosecutions against informing officers, and they never should be subjected to the payment of damages, unless upon the clearest proof of malice, and of there being no probable cause ; for if grand-jurors may be convicted upon slight proof, and mere presumptions, it will deter mankind from exercising an office of great consequence to the public.

Before I close the subject respecting actions of trespass on the case for injuries affecting the right of personal security, I must mention a few instances that have not yet assumed a specific name of action.

• If a person keeps a dog who is used to bite, this action will lie against the owner at the suit of any person whom the dog has bitten ; but the owner must have notice that the dog was used to bite ; for tho if a man keeps animals of a wild nature, as lions, or bears, at large, without proper care, he is answerable for any mischief they do, tho without notice ; yet dogs being of a tameable nature, the owner must have notice of their viciousness, or he will not be liable, and it is therefore matter of substance to set out the notice in the declaration. Therefore where a dog had once bitten a man,

and

And the owner will let him go at large, tho he had notice of the dog's having bitten the person, this action was adjudged to lie against the owner of the dog, tho it appeared that the person who had received the injury, had trod on the dog's toes : for the owner should have hanged him on the first notice, and the people are not to be endangered.

If a man rides an unruly horse into a place much frequented in order to break him, and rides over me, action will lie, tho the person did not intend the injury, for it was his fault to ride the horse in such a place. If a man lays logs or sticks or any thing else in the highway, tho I might have rode by with ease, yet if I am hurt thereby action will lie. So for any nuisance in the highway by obstruction, either by laying logs, making fences, or walls, or digging holes, if I either accidentally or unavoidably sustain any personal injury, action will lie for the recovery of damages.

#### CHAPTER. FOURTH:

#### OF ACTIONS FOR INJURIES THAT AFFECT THE RIGHT OF PERSONAL LIBERTY:

**T**HE only violation of this right is by false imprisonment, which consists in the detention of a person without any legal authority. Every detention of the person, as by confinement either in a prison, a private house, in the stocks, or by forcibly detaining one in the street, is an imprisonment, for which injuries an action of false imprisonment can be maintained. It may be observed that no action of false imprisonment lies against a judge of a court of record, for any act done by him in the execution of his office, nor for any mistake of judgment, neither are his acts, or decisions traversable:

When a person procures an executor or administrator, to be arrested for a debt of the testator or intestate, action of false imprisonment lies against him. It does against the officer for arresting a person not named in the process, tho he should tell him that he was of the name of the person mentioned in the process,

for

1. 1st. 229. 2. Salk. 396. 3. Wilson 368. 4. 2d. 167.



for the officer is bound at his peril to take the right person. *So* it lies if he arrests a person on Sunday.

*a* If the process be erroneous, no action lies against any person, but if the process be void, or irregular, on which the arrest takes place, the plaintiff in the action is liable, and not the officer. *b* So if an arrest be made upon a process issuing from an inferior court not having jurisdiction, or exceeding or not pursuing their jurisdiction, action lies against the party. *c* So tho the original arrest be warrantable, yet for any subsequent oppression, or cruelty, this action lies. *d* So where false imprisonment has been done by the influence, or procurement of another, this action lies against him.

All general warrants not naming the particular person to be arrested are void, as in the case of a warrant to apprehend the authors and publishers of a libel, without naming any person. So warrants to search for stolen goods without naming places, and persons, but to search generally, and apprehend the persons with whom the goods are found, are void.

An officer has no right to levy an attachment, or an execution upon the body of a debtor, when he can find personal estate sufficient to secure the debt, or that in the case of an execution will probably sell at the post for sufficient to discharge the debt, and his fees, or when the debtor tenders the same; but if the officer has good reason to doubt whether the estate belongs to the debtor, and if it be not apparently sufficient to produce the amount of the debt at public auction, tho it may be of the value of the debt, he is not bound to accept it, for he ought not to be obliged to run any hazard. In all cases of an unlawful detention, and confinement of a person without any pretence of a warrant this action lies. When the arrest or detention is legal, the defendant when sued may justify on that ground.

*a* Arrests are legal under the process of a court having cognizance of the cause, which process regularly issued. *f* An arrest is legal made by an officer having power to arrest, or under such officer's, or magistrate's warrant under hand, and expressing the cause of commitment. But then it must appear that the warrant was legal, and

*a* 1 Espin. 409. *3* Wilson 341. *2* Black. Rep. 845. *1* Strange 509. *6* Bull. N.P. 83. *8* Term Rts 525. *d* 2 Black Rep. 1095† *e* 3 Black Com. 437. *f* Idem. *1* Inst. 46.

and issued in a case of which the magistrate had cognizance, for if not, the warrant will not justify the officer acting under it.

*a* Another cause of arrest is such as is warranted by the necessity of the thing, as arresting a felon by a private person. *b* When a person justifies under the process of a court of limited jurisdiction, the plea should shew that the cause was properly subject to such jurisdiction. *c* Where the defendant justifies in like manner under process of an inferior court, and a special authority to imprison, the plea should shew that the authority was strictly pursued: *d* Where a person justifies under a process which is returnable, the plea should shew that it is returned, or it will be bad.

## CHAPTER FIFTH.

### OF ACTIONS FOR INJURIES THAT AFFECT THE RELATIVE RIGHTS OF INDIVIDUALS.

**T**HE relative rights of mankind are those which subsist between Husband and Wife, Parent and Child, Guardian and Ward, Master and Servant.

I. I shall consider the actions for injuries that affect the right subsisting between Husband and Wife. These are three, abduction or taking her away. Beating or otherwise abusing her. Adultery, or criminal conversation,

1. *a* The abduction or taking away one's wife may be either by Fraud and persuasion; or by open violence; but in both cases the law supposes force, and constraint, for the wife has no power to consent, and an action of trespass with force and arms will lie for the recovery of damages.

*f* If any person entices away the wife of another to live separate from him without sufficient cause, the husband may have this action for the injury. *g* As where a woman had unlawfully and without the consent of her husband lived separate from him, and during that time a large estate both real, and personal was devised to her sole and separate use, and thereupon she was desirous of returning, and living with him; but the defendant enticed and persuaded her

*a* 3. Black. Com. 127. *b* 1. Espin. Dig. 421. *c* Idem. *d* 1. Willm. 17.  
*e* 3. Black. Com. 139. *f* 10. 11. 139. *g* Espin. Dig. 434. *h* Bul. N. P. 72.

her to continue absent, which she did till her death, whereby the plaintiff lost the comfort of her company, and advantage of her estate; after verdict, and three thousand pounds damages, the defendant moved in arrest, and it was said, it was an action of the first impression; but the court said, so was every action on the case, and adjudged the action to lie on account of the special damage.

But in these cases there ought to be proved an actual seduction, or open violence, in taking, or keeping away the wife: but for one man to perform a neighbourly act to the wife of another, or to receive her into his house when flying from the abuse of her husband, out of mere compassion without any sollicitation, or attempt to keep her, can be no injury.

2. \* For the injury of beating and abusing the wife; she and her husband have a right jointly to bring their action, for the recovery of damages; and the husband has no right to a separate action unless the battery be so great, as to deprive him of the comfort, company and assistance of the wife, then a special action on the case will lie for the recovery of damages, for the injury he sustains in being deprived of her comfort, and company.

3. \* An action of trespass with force, lies against a person for committing adultery, or having criminal conversation with the wife of another. The ground of this action is the injury done to the husband by alienating the affections of his wife; destroying the comforts arising from her company, and that of her children, and imposing upon him a spurious issue.

\* In this action the plaintiff must prove actual solemnization of the marriage by the record, or a copy of the record of the authority, who performed the ceremony, or by some witness who was actually present, and saw the marriage: and this proof cannot be supplied by cohabitation, reputation, or any collateral circumstances. \* The injury in the case of adultery being great, the damages are generally considerable: but they are increased, or diminished, according to the circumstances of the case, from the consideration of the rank and quality of the plaintiff: so from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependant of the plaintiff. So if it appeared that the plaintiff, and his wife lived happily before

\* 3. Black. Com. 140. \* 1 Espin. Dig. 430. 3 Black. Com. 139. \* 4 Burr 2057. \* Bul. N. P. 27.

before that transaction and acquaintance with the defendant. So that the wife has always borne a good character till then, or that there was a settlement and provision for the children of the marriage. All these go in aggravation of the damages, in which also the circumstances and property of the defendant are always considered.

So there are many circumstances which go in extenuation of the injury and mitigation of the damages. As if it appear that the plaintiff encouraged and connived at the address of the defendant to his wife, as where he shewed her naked to him, when going into the bath, tho the plaintiff was a man of rank, he obtained but one shilling damages. The defendant may give in evidence, that the plaintiff's wife had been criminal with others, that she eloped before, that the husband turned her out of doors, and refused to maintain her, that he kept company with other women, that he consented to the defendant's familiarity with her. All these are proper evidence in mitigation of damages. The defendant may give in evidence, that the wife had a bastard before marriage, but not the general reputation of her being, or having been a prostitute, because this might arise from her connexion with him.

If a man suffers his wife to live as a common prostitute, and a man is thereby drawn into criminal conversation, no action will lie at the suit of the husband; because it is a damage without any injury, but if the wife live in a state of prostitution, without the privity of the husband, it will not bar the action, be she ever so profligate, but only go in mitigation of damages. But tho in the case where the husband suffers his wife to live in a state of common prostitution, he shall recover no damage; yet the action is held to lie tho there be clear proof of his consent and privity to the defendant's familiarity with her; for such consent will not justify the act: and a distinction is taken between an indiscriminate prostitution, and a criminal connexion with one person only.

Action will lie in favour of the husband against a physician for the performing an unskilful operation on his wife, by which he was put to expence, and deprived of the assistance and company of his wife, and by which she lost her life. *b* The plaintiff in his declaration stated, that his wife had a scrophulous humour in one of her breasts

breasts, which required amputation ; that the defendant having been for many years a practising physician, and professing to be well skilled in surgery, applied to the plaintiff, and affirmed that he had competent knowledge and skill, to amputate said breast ; and the plaintiff consented and engaged to pay him a reasonable reward, in consideration of which the defendant promised to perform said operation with skill, and safety to the wife of the plaintiff ; that the defendant did amputate said breast in a most ignorant, cruel and unskilful manner, contrary to the well known principles and rules of practice in such cases. That he cut off her breast, and laid on a plaister of lint, without taking up any of the arteries, or blood vessels, wound a sheet round her body, and laid her on a bed, in which miserable situation she languished about three hours and died of the wounds inflicted by the hands of the defendant ; that he had failed to perform his undertaking ; by which the plaintiff was put to much expence, was deprived of the assistance and company of his wife during her life, and forever by her death.

A special accord and satisfaction was pleaded in bar, but found against the defendant by the jury ; and on motion in arrest for the insufficiency of the declaration, it was contended that this was a felony, and by the common law the private injury was merged in the public offence ; but the court said that this rule could apply only in capital offences, and from necessity where the offender must go unpunished, or the injured individual unredressed ; and adjudged the declaration to be sufficient.

2. *a* In respect of parents and children, and guardian and ward, it seems there is a doubt whether an action will lie at common law for the abduction of children and wards, from their parents and guardians. Judge Blackstone is inclined to think it will. But as the parent has a right to the service of the children till they are twenty one years of age, there can be no doubt, but that the same action will lie for any injury arising from loss of service, in the same manner, as in the case of master and servant, which will be considered under that head.

But there is one action that lies in favour of the father, for an injury done to his daughter, of such peculiar and important nature, as merits particular investigation.

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a An action will lie in favour of the father, against a person for getting his daughter with child, by which he sustains a loss of her service, and is put to expence, in supporting and providing for her, during her sickness. But this action is grounded solely on the loss of service and the expence. b For an action will not lie in favour of the father, against a man for debauching his daughter; for this is an injury which merely affects the feelings of the father, as it respects the honour of his family, and no action lies unless there be some temporal loss and damage. But tho this action is grounded on the loss of service and the expence, yet in the estimation of the damages, the jury are by no means confined to give the sum actually expended by the father and the value of the service that was lost; but they may consider the circumstances and character of the parties, and the dishonour done to the family, as well as, whether it be a deliberate seduction of an innocent girl belonging to a respectable family; in which case they ought to give liberal damages, not only for the purpose of making all possible reparation to the party injured, but to operate as an example to deter others from similar conduct. For this is the only legal mode by which young men can be deterred from the base and cruel practice of seduction. The law which subjects them to maintain the bastard child, will have no effect upon the mind of a man of opulence. But by this action such damages may be given, as will operate as a most powerful restraint upon the passions of a man who disregards the principles of honour and virtue, and is unmoved by the anguish and distress of a family that he has plunged in infamy and ruin. But where the girl is of a bad character, and no ungenerous, dishonourable arts were practised to take advantage of her, then the actual damages only ought to be given..

Such are the principles which the courts of law have wisely adopted in England, and our courts ought to adopt the same. For since female chastity is a virtue of unspeakable importance to the felicity of the human race, and since it is not always defended by impenetrable armour, we ought to guard it from attacks by the strongest possible barriers.

c By the English practice, actions of trespass with force, for breaking into the house of the plaintiff, and assaulting and getting his

a 3 Wilson, 18. b 2 Ld. Raym. 1032. c 3 Burr. 1878. 3 Wilson, 18. 1 Sid. 225.

his daughter with child, have always been brought. Such was heretofore the practice in this state. In the celebrated case of *Mott* against *Goddard*, action of trespass with force was brought, and the verdict of the jury for the plaintiff; the court gave their opinion, that to support the issue it was necessary that there should be evidence that the defendant entered the house by force; and that proof of his debauching the daughter did not support the issue. This opinion is contrary not only to the practice of our courts, but to every British authority, and is a distinction of no consequence; for every unlawful act implies force, and the debauching the daughter of the plaintiff, being an unlawful act made him a trespasser from the beginning, or at the time of entering the house, as there was no pretence of an express licence. The jury being sent to a second consideration, the plaintiff withdrew his action. How far this opinion of the court will be considered to be law, under these circumstances cannot be determined.

It is an established principle that in all cases where the daughter is under the age of twenty-one years, that the father can maintain this action, and in all cases where this action will lie the daughter is a legal witness.

But where the daughter is of age, there seems to have been a question whether this action will lie in favour of the father. Upon this question these cases have been decided. This action was brought in an instance where the daughter was twenty three years of age, had hired herself as a servant to another person, and went to live with him, and during her service was gotten with child: Her master then dismissed her as she was unable to perform the service she engaged, paying her in proportion to what she had done, and she returned to her father, who received her when no one else would, and maintained her in lying in. After verdict for the plaintiff, on motion in arrest it was contended that the daughter being of age, the father had no right to her service; and that as loss of service is the ground of the action, that it could not lie. That tho the father was obliged by statute to maintain his daughter, yet it was not stated in the declaration that she was unable to maintain herself, or that he was able to maintain her. The case was compromised after argument, but the court intimated their opinion that the action would not lie.

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a In a subsequent case the daughter was thirty years of age and lived with her father as his servant, but not upon any special contract of service, and it was held that the action would lie.

b In consequence of the opinion of the superior court in the case of Mott vs. Goddard, the plaintiff brought forward an action of trespass on the case against the defendant, for entering his house against his mind and will, and debauching and begetting with child his daughter, and servant, under his protection and dependant upon him for support; by which he lost her service, and was put to expence in supporting her during her sickness, when she was delivered of a bastard child.

The defendant pleaded in abatement that the daughter of the plaintiff was more than twenty-one years of age, possessed of a large estate, able to support herself and child, and under no constraint of service to the plaintiff; and traversed the fact of her being the servant of the plaintiff, and dependant on him for support, and also that he had been put to necessary expence to support her and her child. On these facts issue was closed and the jury found that the daughter was not the servant of the plaintiff and dependant on him for support as he had alledged. On a motion in arrest, stating for reason that the issue was immaterial, the court adjudged the motion to be insufficient; for the plaintiff had made the loss of service and expence in supporting his daughter, the gist of his action, which the jury have found not to be true.

There can be no question, but that an action will lie as well in case of expences incurred by reason of sickness, where the parent is bound to support, and the daughter is indigent, tho he is not entitled to her service, as where there is a loss of service; for either, or both have been considered as the ground of this action. But there is no authority to warrant an action merely for the insult and scandal offered to the parent, and the injury done to his feelings; tho it must be acknowledged that this is the bitterest and heaviest part of the injury, and would form the strongest ground of action. It is a question that does not belong to me to determine, whether it is best for society to furnish such a remedy to prevent the commission of injuries, which no pecuniary compensation

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penation can repair, or to leave it to parents to instil into the minds of their children, in their education, sentiments and principles, which will guard against seduction, and debauchery.

In another case, the plaintiff in an action of trespass on the case declared, that his daughter and servant under the age of twenty-one years, depended on him for support, was pregnant with a bastard child, and had commenced a prosecution against the brother of the defendant, for maintenance. That the defendant to defeat her action, procured for twenty pounds a stranger to marry her, with the deceitful and fraudulent design to procure a discharge for his brother, which he effected. That the stranger who married her, carried and kept her out of his service for a month, and left her destitute and forlorn. That the General Assembly granted her a divorce, and declared the marriage null and void from the beginning. To this declaration there was demurrer, but adjudged sufficient, on the ground of the loss of the service, as the marriage being declared void from the beginning, could give no right to take the daughter out of the service of the plaintiff.

3. There are two injuries which a master may sustain in respect of his servant. One is the enticing away, or retaining one's servant, whether hired, or under any other obligation to serve, before his time of service is expired; and the other is beating, or confining him in such a manner as disables him to perform his work.

In regard to the first injury, the master may have his action against the servant for his breach of contract; or he may have an action of trespass on the case against the person who induces and persuades the servant to violate his contract, by enticing him away, or retaining him from the service of his master, because he has legally entitled himself to the benefits of the labour of the servant for the time limited, and whoever defeats him of that benefit, is a wrong doer, and must make good the damages: but if the new master was not acquainted with the former contract, and delivers up the servant on demand, he is liable to no action.

In the case of beating and confining the servant, so as to prevent him from fulfilling his contract, and performing the service he owes, the servant may have his action of trespass for the assault and battery, and false imprisonment; and the master may have his action of trespass on the case for the special damage he has sustained by the loss of service; but it is necessary to allege, and prove a special damage by loss of service, otherwise no action lies. So if a man digs a pit in the highway, into which my servant falls and breaks his limbs, or so wounds him as to disable him from performing his service, action will lie for the loss of service. So if a man threatens my servant, and in fear of battery he is prevented from performing service, action lies.

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#### CHAPTER SIXTH.

### OF ACTIONS FOR INJURIES THAT AFFECT THINGS REAL.

**T**HE injuries that affect things real are, 1. Disseisin, 2. Refusal to make Partition, 3. Trespass, 4. Waste, 5. Nuisance.

1. Disseisin, dispossession, or ouster may be described to be where a person keeps and holds the possession of lands to the exclusion of the rightful owner, for let the mode of acquiring the possession by the trespasser, be whatever it will, he is in contemplation of law a disseisor, while he keeps out of possession him, who has the lawful right. If a man enters upon lands by turning the owner out of possession, or of having the right of improvement for a term he holds over his term; or if on the death of the proprietor he enters before the heir, in every such instance, and in every other supposable mode of gaining the possession, and holding it wrongfully, he is deemed to be guilty of disseisin.

Whenever a person is the legal proprietor of lands, he has a right to make his entry upon them in a peaceable manner.

In all cases, where the proprietor of lands and tenements is disseised, or wrongfully holden, and kept out of possession, an action of disseisin lies for the recovery of the lands in question, and the damages

damages for the unjust detention. This is the only real action known to our laws, and as it is generally extending to every possible case in which the possession of land can be demanded, it is the only one that is necessary. It is peculiar to this state, and was not introduced by statute, but by the practice of the courts of law. It is a capital improvement upon the common law respecting real actions, and is a striking evidence of the propensity of our progenitors, to improve upon and simplify the laws of their native country. This action comprehends all the actions in England, by writ of right, writ of entry, and ejectment, with all the multifarious divisions, into which they were branched; of this vast variety of actions which were perplexed and embarrassed with a thousand nice distinctions and fictions, the sole object is to enable the owner of lands to recover the possession from the disseisor, and his damages for the detention. As the object is single, tho attended by a variety of circumstances, our action of disseisin is wisely calculated to attain this object under all circumstances. Upon no other subject, has human ingenuity ever been exerted in every possible shape of refinement and distinction, so much as on the law in respecting real actions. Nor was there ever an artificial system of law more abstruse and intricate. But by a single stroke, the basis of this artificial fabric is dissolved, and on the ruins of it, we have erected a structure, wonderful for its simplicity and beauty. The single action of disseisin, regulated by the plainest principles, is much better calculated to answer the purpose of real actions than all the actions which have been devised in England. It avoids all the circuitry and fiction of the action of ejectment, which has in a great measure superseded the antient real actions in England, and by which the title of lands is now generally tried, and determined. It is calculated to bring the single question of property fairly and directly upon trial, unembarrassed by technical forms.

Every person who is the proprietor of lands or tenements, or is entitled to their use and improvement, may bring this action to recover their possession. The plaintiff must state in his declaration his title, whether it be an estate in fee simple or any lesser estate. The land must be so described by lines and bounds as to ascertain and distinguish it from any other land with precision; but whether

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it be arable, mowing, or woodland, need not be mentioned. The plaintiff declares that he was seised and possessed of the demanded premises on a day certain, and that afterwards, on some day, the defendant, entered thereon, disseised the plaintiff thereof, and put him out therefrom, and that he has ever since continued to deforce the plaintiff thereof, and hold him out therefrom, taking the whole profits to himself, and then the plaintiff demands the seisin of the land, which is essential, and his damages : for in this action, the plaintiff is not only entitled to recover the seisin of the land, but his damages for the detention.

Tho he alleges a seisin and possession of the lands demanded ; yet there is no necessity of proving that he ever had actual possession. He must prove the defendant to be in possession ; and then the whole question will turn upon the point of right : and if he can prove a good title, tho he never had possession, he supports his action.

This action may be brought against any person who is in the actual possession and improvement of the lands. If a tenant be in possession under some person, who claims to be the proprietor, he may defend by force of his title, or may admit the tenant to defend in his name. When the action is thus commenced, upon the general issue of not guilty, the parties have a fair opportunity of deciding the title to the lands. The plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's. It therefore behoves him to shew, not only that he has a better title than the defendant, but that he has a compleat legal title, and on failure he cannot recover, let the title of the defendant be ever so defective. The nature of titles to real property has been fully discussed in the preceding book of our enquires, and the principles there unfolded must be applied in the trial of this action. It is therefore unnecessary to enlarge upon that subject in this place.

The action of disseisin is considered of as high a nature, as the writ of right by the common law, for it is a bar to another action for the same land. Therefore when there has been one trial upon the same title, between the same parties, or their tenants,

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holding and defending under them, it is a bar to another action: but if an action be brought against a stranger or trespasser, and a recovery of possession, this will be no bar to an action brought by the rightful owner; for he was neither party or privy, to the first action, and his title was not decided by it.

The action of disseisin is considered in the nature of an action of ejectment at common law; because damages may be recovered, as a compensation for the injury of the disseisin. In all instances, the court and jury take the damages into consideration, and assess such sum as is just and reasonable, and award the same to be paid to the plaintiff, which settles and discharges the demand for damages. In England, it is the practice in ejectment to find but one shilling damages, and leave the party to recover the mesne profits, or the value of the use of the land by an action of trespass. But as the damages can as well be recovered in an action of disseisin, as an action of trespass, reasonable damages ought always to be allowed to save the expence of another action. This practice of assessing damages in an action of disseisin, is an improvement upon the common law of England.

This is the only action in which the ultimate fee of the land can be directly tried; but there is a process by force of the statute, respecting forcible entry and detainer, by which the right of possession may be decided.

Upon complaint made to one or more assistants, or justices of the peace, of a forcible entry into houses, lands, or tenements in the county where they live, or of any wrongful detainer by force and strong hand, and with violent words and actions, which tend to frighten; then they in convenient time, at the cost of the party grieved, shall go to the place with the sheriff of the county, or his deputy, and such power of the town and county, as they think necessary, and may arrest such offenders, and all the people of the county, when called upon, shall aid and assist therein, upon pain of imprisonment, and paying a fine of twenty shillings to the county treasurer.

And two assistants, or one assistant and one justice, or two justices, one being a justice of the county court, may make out a war-

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rant directed to the sheriff of the county, or his deputy, commanding them to cause eighteen sufficient and indifferent freeholders of the town, to come before them, having freehold estates rated in the list at fifty shillings; fourteen of which at least shall be impanelled, and sworn to make true enquiry and return a verdict according to evidence. By which jury, such authority may make enquiry respecting a forcible entry or detainer, and if such jury find the same, such authority may cause the party so put, or held out of the lands and tenements, to be resealed and to be again put into the possession of the same, and to tax costs in his favour against the person convicted of the forcible entry, or detainer: but in case the verdict be found against the complainant, cost may be taxed, and execution issued. The person convicted may be fined a sum, not exceeding twenty shillings to the county treasurer: and may be by the authority bound to his good behaviour, and committed to prison, till he pays the fine and finds sureties for his good behaviour till the next county court; then to appear, and in case of a high handed breach of the peace, may be bound to the next county court, who may increase the fine according to the aggravation of the offence.

If the sheriff neglects his duty, he may be fined five pounds for every default. If he be a party, or related to either party, in the degree of father and son, or brother by nature, or marriage, or uncle and nephew, or if he be landlord, or tenant to either of the parties, then a constable of the town not so related shall act in his stead; and every juror legally summoned, and not appearing shall be fined ten shillings.

The party grieved shall recover treble damages and costs of suit by an action of trespass against the defendant if it be found by verdict, or in any other form according to law, that he was guilty of forcible entry or detainer. The statute provides that it shall not extend to persons who have had peaceable possession for three years and their estates are not ended.

In all cases of a forcible entry, it is apparent that the only enquiry must be respecting the force, and not with regard to the right of property, or possession: for in such cases no person has a  
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right to obtain possession of his own lands, or tenements by force, because it disturbs the public peace, and he ought rather to have recourse to his remedy by law. In respect to the true import of forcible detainer, there seems to be more doubt and uncertainty. A forcible, or wrongful detainer may be after a forcible entry; or after an unlawful, but peaceable entry, or after a peaceable and lawful entry. If a person should be absent from his house a short time, and another enter quietly, if on return of the owner, he holds possession by force and strong hand, it is a forcible detainer. If I leave for a short time houses, or lands, the lessee goes into possession quietly and lawfully, but if he holds over his term by force and violence, he is guilty of a wrongful and forcible detainer. But here in the case of a detainer, it is necessary that there be an enquiry respecting the right of possession, for a stranger may come and attempt to take possession of my house, and I may resist him with force. If there can be no enquiry respecting the right, he may turn me out of my house on account of the force I used to defend it. But then upon this process no enquiry can be made, and no decision be had respecting the title, and the right of possession must be the only enquiry.

2. Wherever there is a refusal to make partition of lands, or tenements holden in coparcenary, joint tenancy, or in common; the statute provides that it may be compelled by writ of partition, excepting in the case of town's commons. As the statute has not prescribed the mode of proceeding, we must have recourse to the common law.

In all cases where coparceners, joint tenants, or tenants in common refuse, or cannot agree to make partition, then one, or more may bring an action against the others to compel the making of partition. The writ, or declaration ought to describe the estate, or lands in question, in the same manner as in the action of disseisin, and then the nature of the estate, and the proportions in which it is holden by the several owners. <sup>a</sup> To state the quantity only without the proportion is ill, it must be averred that the defendants have refused to make partition tho requested, and must demand that partition be made. If there be a dispute respecting the title, then the defendant may plead, that he does not hold in manner and  
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<sup>a</sup> *Champion vs. Spencer*, Sup. C. 1790.

proportion as the plaintiff alledges, and on this issue the title may be decided. If it be found that the lands are holden in manner, and proportion as the plaintiff alledges, or if the defendant acknowledges it, or is defaulted, then the first judgment is, that partition shall be made. If the defendant disputes the right of the plaintiff, or contests the proportion, he must do it in the first stage of the cause : for when judgment is rendered that partition be made, it cannot be disputed. The court then issue a writ to the sheriff of the county, directing him to take twelve men, or freeholders of his county, and go to the lands, and make fair and equal partition between the parties in their presence, if they appear on summons, and allot to each party their full and just share, and make return of the writ and partition, with the name of the jurors ; on which motion being made to the court, the second judgment is, that the partition shall be forever holden to be firm and established.

But in this state, it has not been commonly practised to direct the sheriff to make partition by a jury of twelve men, but the court have appointed a committee of three men, for the same purpose, who with the sheriff make partition, in lieu of a jury.

2. Where several tenants in common, join in an action of disseisin against a disseisor, the nonsuit of one, will not affect the rest, but may be considered as a severance. A release from one to the defendant, will not bar the rest ; but they may proceed for their shares against the defendant, tho a tenant in common, who shall not purge the disseisin, by a purchase of part of the plaintiffs, and they shall recover according to their title, and obtain possession with the defendant.

3. Trespass is the next injury, that may be done to real property, that is to be considered.

Trespass in its largest sense, means any transgression, or offence against the laws of nature, of society, or of the country in which we live, whether it relates to a man's person, or property ; but in a legal sense, trespass with force, is applied to designate only the actions that may be brought for injuries done to things real and personal. At present I am to consider trespass only, as it constitutes an injury to things real.

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*a* Every proprietor of real estate, is considered to have the sole and exclusive right, to the use and improvement of it. In the eye of the law, the land of every man is inclosed and set apart from his neighbour's, and this may as well be done by the mere ideal line that runs between them, and bounds their lands, as by a real material fence. Every unwarrantable entry upon the lands and tenements of another, without his consent, is deemed a breaking of his close, and is an injury. If no other damage can be shewn, the law will suppose that there is a treading down and destroying the herbage. From a strict construction of this rule, a person who merely goes on to the land of another, is a trespasser; but this rule ought to be considered under certain restrictions, for where a person merely walks across the land of his neighbour without any intention to commit a trespass, and without doing the least damage, as may frequently happen in the intercourse between neighbours, this ought not to be judged a trespass, and this seems to be the practice, for no actions are ever brought under these circumstances; but where a person enters upon the land of another, against his will, having been prohibited, with a tortious intent, or when damage is actually done tho' not intended, then action of trespass ought to lie. In all these cases however, damages are to be proportioned to the nature of the injury. Trespass to a man's land may be committed by a great variety of acts, as treading down and destroying the herbage, digging up the soil, cutting down and carrying away timber; and all acts by which damage is directly done, are deemed trespasses with force.

*b* Trespass lies by the owner of the soil, against a person for breaking his close, and hunting there, and killing his conies, or other animals of a wild nature: for the owner of the soil has the property of such animals of a wild nature, as are found on his land, and killed. As if a hare is started and killed on my land, it is my property; but it is otherwise, if hunted into the ground of a third person, for then it is the hunters.

*c* But there are sundry instances in which the entry upon the land, or house of another, is justifiable and shall not be deemed a trespass; as if a man goes there to demand, or pay money, there payable; or to execute in a legal manner the process of the law.

*a* 3 Black. Com. 209.

*b* Salk. 556.

*c* 3 Black. Com. 213.

law. A person may enter into an inn, or public house, without the leave of the owner first specially asked, because when a person keeps an inn, or public house, he thereby gives a general licence to any person to enter his doors. So a person may justify entering on the land of another, if he has any lawful occasion, as the reverſioner, to ſee if any waſte be committed on the eſtate, on account of the apparent neceſſity of the thing. In like manner the common law warrants the hunting of ravenous beaſts of prey, as foxes and wolves, in another's land, becauſe the deſtroying ſuch creatures is a public advantage. But in theſe caſes, if a man miſdemeans himſelf, or makes an ill uſe of the authority with which the law entruſts, he ſhall be accounted a treſpaſſer from the beginning; as if one goes into a tavern and will not go out in a reaſonable time, but tarries there all night, contrary to the inclinations of the owner; this wrongful act, ſhall affect and have relation back even to his firſt entry, and make the whole a treſpaſs; for the law preſumes that he entered the houſe with that intent. But a bare miſemeanſance, as not paying for the wine he calls for, will not make him a treſpaſſer, for this is only a breach of contract, for which the taverner has his action againſt him. So if the reverſioner, who enters on pretence of ſeeing waſte, breaks the houſe, ſtays all night, or cuts down trees; in theſe and in ſimilar caſes, the law judges that he entered for this unlawful purpoſe, and therefore as the acts which demonſtrate ſuch to be his purpoſe is a treſpaſs, he ſhall be a treſpaſſer from the beginning. So in the caſe of hunting a fox, or any wild beaſt of prey, a man cannot juſtify breaking the ſoil and digging him out of the earth, for tho' the law warrants the hunting of ſuch noxious animals for the public, yet it is held that ſuch things muſt be done in the uſual manner; therefore as there is an ordinary mode of killing them by hunting, the digging of them is unlawful.

I may juſtify entering upon the land of another to ſave his beaſt, the life of which is in danger, to prevent his beaſt from being ſtolen, or his corn from being conſumed, or ſpoiled by beaſts; to take away my tree that has blown down and fallen on his land, to take the fruit of my tree that has fallen on his land, to retake my beaſt which has been ſtolen, or which has been driven there by the owner, or a ſtranger by his conſent. I may chaſe the beaſt of

another

another doing damage on to his own land ; but if a stranger do it he is a trespasser, because he prevents me from impounding it. If I chase the beast of another doing damage, with a little dog out of my close, and the dog pursue it into his, tho I endeavour to call it off, no action lies, for the first act was lawful, and the last I could not prevent.

\* I may go upon the land of another to cut trees which I have purchased of him, or corn there growing to which I have a right. A man may dig upon the land of another, to raise a bulwark against the public enemy, or upon land contiguous to navigable rivers, with men and horses to tow a boat or barge.

It is generally true that a man may not enter the house of another without licence, tho the door be open, because it is his castle. But a person may enter a house the door being open, to search for and take away goods which the owner has unlawfully gotten, or which were stolen, or to tender money, or to part persons that are fighting. Indeed the general rule is that I may enter on the lands or tenements of another, to do any act which I have a lawful right to perform ; or which the law enjoins on me as a duty, if such entrance be necessary to enable me to do the act.

Where the law allows an entry on the lands of another for a particular purpose, trespass will not lie. As in the case of highways, which if they become impassible by the overflowing of a river, or other cause, passengers may justify going on the adjoining fields. But the case is different of a private way over the land of another, for there, if the way becomes impassible, the person who is entitled to the way cannot justify going on the lands adjoining, for the grant of a way is only in a particular place.

In respect of the person who has the right of bringing an action of trespass, for an injury done to lands ; it seems agreed, that it is not necessary that the plaintiff should have an absolute property, or any interest in the soil.

\* But the person who has the lawful possession in fact of lands, and is entitled to the vesture and herbage, may maintain the action of trespass, for breaking the close and treading down and destroying the herbage. But this possession in fact must be a lawful

a 5 Bacon Abr. 18c, 181 Title tresp. b 2 Espin Dig. 37, c 3 Black. 41a.  
 Espin. Dig. 88. Co. 11r. 46. 5 Bacon Abr. 166.

lawful one, for a person that is considered in the light of an intruder, trespasser or disseisor, cannot maintain this action. Therefore if I purchase lands, and go into possession and do not record my deed: or if I purchase and go into possession without taking any deed; or if I am tenant at will, or by sufferance, I can maintain this action against a stranger, because I have the lawful possession. So if I agree with the owner of land, to plow and sow it and give him half the profits; I may maintain this action against any person for treading down and destroying the corn. So where a meadow is divided annually among a number of parishoners by lot; then after each person's several portion is allotted, they are capable of maintaining an action for the breach of their several closes: for they have separate interests.

But to maintain trespass, the plaintiff must have been in possession at the time when the injury was done, for the proprietor who has the general property, cannot maintain an action for the injury done while he was out of possession. Before an entry and actual possession, one cannot maintain trespass, tho he has the freehold in law. A disseisee, may maintain trespass for an actual disseisin, against the disseisor, because he has been in possession, but cannot maintain trespass for any injury after the disseisin. Such is the common law of England; but I apprehend our courts have adopted different principles, and that whether the proprietor was ever in possession, or not, he may maintain action of trespass against disseisors in all the cases where he can maintain disseisin. But where there is a person in lawful possession under him, that he cannot maintain this action, unless it be in one instance. By the common law, lessee for life, or years, of land, has no property in the trees growing on the land, even if the lease be without impeachment of waste. But if a stranger cuts down any trees, lessee may maintain trespass, but he shall not recover damage for the value of the trees, because the property in them, is in him in reversion, but the damage shall be for breaking the close and cropping the wood, and loss of shade. In short leases, if the lessee cannot recover the value of the timber in damages for cutting it down, it seems reasonable that the ultimate owner should have his action for that purpose. But in very long leases where it is unknown who will be the reversioner at the time

time of the termination of the estate, and where at the time the action for the trespass will be barred by the statute of limitations, it seems necessary that the lessee for years, should maintain this action, otherwise the trespasser can never be subjected to the payment of adequate damages.

A man is not only responsible for his own act of trespass, but also for any injury done by his cattle, or creatures; and if they break the close and enter upon the land of another, by reason of his negligent keeping, or his driving them, the owner is accountable for all the damage they do, in treading down, bruising and consuming the herbage, and spoiling his corn, or his trees; but if the cattle enter upon the land of another, by reason of the negligence of the owner of the land, as if the fence be insufficient and not according to law; or if the bars, or fence be let down and the cattle pass thro, the owner of them is not answerable for the damage done. The law respecting fences will be considered, when we come to treat of replevin. For all injuries done by cattle to lands, the law gives the party injured, a double remedy; either by impounding them, or by an action of trespass, which we are now considering.

Whenever a person has sustained any injury to his lands by the act of another, or his cattle; action of trespass will lie against the trespasser, or the owner of the cattle, for the recovery of damages. For every act of entering upon the enclosures of another, by man, or beast, is deemed to be a direct and forcible injury. The plaintiff in his declaration must set up property and possession in the land, or at least, actual and lawful possession: he must describe the place where the trespass was committed by proper boundaries, must allege a breaking of the close with force and arms, and entering thereon, and doing damage. If the trespass be committed by cattle; then the plaintiff alleges in his declaration, that the defendant with force and arms, broke and entered the close of the plaintiff, and trod down and consumed the grass, or grain, then and there growing, with his cattle, that is, with oxen, horses, hogs, or sheep, as the case may be.

In trespasses of a permanent nature, where the injury is continually

timally renewed, (as by spoiling and consuming the herbage by the defendants cattle,) the declaration may alledge the injury to have been committed by continuance from one given day to another, which is called laying the action with a continuando, and the plaintiff shall not be compelled to bring separate actions, for every separate trespass; as if a man's cattle should break into one's enclosure a number of days in succession, or if a person should at a number of different days, enter on the land and cut timber, one action may recover all the damages done on the different days, by laying a continuance of the trespass from day to day, or from such a day to such a day; but where the acts done are of a different nature, and each constitute a separate, distinct trespass, they cannot be laid by continuance; but separate actions must be brought for each trespass.

Sometimes in actions of trespass respecting lands, the defendant justifies in virtue of his title, and then the right of property is collaterally tried; but the judgment of a court in one action, is no bar to another. \* When action of trespass is brought before an assize, or justice of the peace, and the defendant justifies upon a plea of title, a record shall be made, and the matter of fact shall be taken as confessed, and the party making such plea, shall become bound with one or more sureties to the adverse party, in a sum not exceeding twenty pounds, on condition, that he shall pursue his plea, and bring forward a suit for the trial of his title to the next county court in the county, and pay all costs and damages that may be recovered against him; which recognizance, the assize or justice of the peace are empowered to require and take; and if the defendant refuses to become bound, his plea shall abate, and the court shall proceed to try the case, and on proof of the commission of the trespass shall award damages and costs. But if he becomes bound, they are to certify the process, the record of the plea and the recognizance, to the next county court, and if the recognizer fails to bring forward his suit, the default shall be recorded, and a scire facias shall issue to recover the penalty of the recognizance of him and his sureties.

Or if on trial before the court, he shall not make out a title to the land or tenement where the trespass is said to be done, paramount

\* Statutes, 255.

amount to the title or possession of the adverse party, judgment shall be rendered for the party trespassed upon, for treble damages and costs of suit.

Upon this statute, it is the practice to follow the mode pointed out by the last clause, and the defendant brings forward no new action, but causes the one commenced before the assistant, or justice of the peace, to be entered in the county court, and the parties proceed to trial upon the title of the lands, as above mentioned, and as this is merely an action of trespass, a judgment in one case is no bar to another action. But the original action must be trespass; *a* And where the plaintiff brought trover for certain bark taken on land; the defendant justified by a plea of title to the land, and the cause was removed to the county court, and then appealed to the superior court, who dismissed the process as irregular and not before the court.

*b* The defendant is obliged to abide by his plea of title given before the justice, and cannot afterwards alter it, and plead not guilty.

In addition to the common law, some regulations respecting trespass on lands, have been introduced by statute. Every person that shall cut, fell, destroy or carry away any trees, timber or underwood, standing, or lying on the lands of any other person, or that shall aid therein, without licence from the owner, shall pay to the party injured, ten shillings for every tree one foot over; and for all trees of greater size, three times the value, besides ten shillings; and for every tree or pole of less dimensions five shillings; which may be recovered by action on the statute.

Every person that shall gather, destroy, or carry away any bayberries from another's land, without leave, or that shall be aiding, shall pay to the party injured, three times the value of what shall be gathered, destroyed, or carried away; and three shillings for every bushel, and in the same proportion, for a greater or lesser quantity to be recovered as aforesaid. But if it appear that such trespass was committed by mistake, and the person supposed he was on his own land, he shall pay in damages only the just value of the timber and bayberries.

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*a* Sweet vs. Dow, Sup. C. 1792.      *b* Briggs vs. Woodruff, Sup. C. 1793

Every person that shall set fire on lands, which runs on to common land, or that belongs to any particular persons, or that shall be aiding, shall pay all damages to the owners of the lands. ...

If upon any action, bill, plaint, or information, grounded on this statute, the plaintiff shall charge the defendant with trespassing in the particulars above mentioned, or with being aiding, and make out that the same facts have been committed, and that he suspects the defendant, tho he be able to produce no proof only to render it highly probable, then unless the defendant will acquit himself on oath, the plaintiff shall recover the penalties and damages aforesaid, with cost; but if the defendant acquit himself on oath, he shall recover double cost. I never knew a process in this form. In all actions founded on this statute, the practice has been to rely on common law proof; but in such actions, the facts must be charged directly against the defendant, and not that the plaintiff suspects that the defendant committed the trespass.

4. Waste is a spoil, or destruction in lands, houses, gardens, trees, and the like, to the disherison of him that has the remainder, or reversion in fee simple, or fee tail.

Waste is either voluntarily, which is a crime of commission, as by pulling down a house; or it is permissive, which is a matter of omission only; as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the inheritance or freehold is waste. Therefore removing wainscot, floors, doors, or other things once fixed to a house, is waste. If a house be destroyed by tempest, lightning, or the like, which is the act of God, it is no waste; but otherwise, if the house be burned by the carelessness, or negligence of the tenant. Waste may also be committed in fish ponds, dove houses, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. Timber also is a part of the inheritance; such are oak, ash, and elm in all places. And so are all kinds of trees that are generally used for building, and to cut down such trees, or to top them, or do any other act whereby the timber may decay, is waste. But

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underwood,



underwood, the tenant may cut down at any reasonable time when he pleases ; and he may take of common right, sufficient wood for his fire, necessary repairs and fences. The conversion of land from one species to another, is waste ; to convert wood, meadow, or pasture into arable , to turn arable, meadow, or pasture, into woodland ; or to turn arable, or woodland, into meadow, or pasture, are all of them waste ; for it not only changes the course of husbandry, but the evidence of the estate. But I presume, in this country, such conversions in this respect as are compatible with good husbandry, would not be deemed waste. The same rule is observed for the same reason, with regard to converting one species of edifice, into another, tho it be improved in its value. To open the land to search for mines of metal, and the like is waste ; for that is a detriment to the inheritance. But if the mines were open before, it is no waste for the tenant to continue digging them for his own use ; for it is become the mere annual profit of the land. These three are the general heads in waste ; that is, in houses, timber and land. But whatever tends to the destruction, or depreciating the value of the inheritance is considered to be waste.

In England, by the statute of Gloucester, tenant for life, for years, in dower and by the curtesy, or law of England, are punishable for waste, by a forfeiture of the thing, or place wasted, and treble damages. But as that statute is of no validity here, we must ascertain the common law, to know our own law.

• The English jurist agree that tenants in dower and guardians, by the common law were punishable for waste ; but they disagree respecting the question, whether tenants for life and by the curtesy, were punishable for waste, at common law. Lord Cook, who is deservedly considered as the oracle of the common law, is of opinion, that by the common law, waste was punishable in three persons, tenant in dower, tenant by the curtesy, and guardian. But that tenant for life, or for years, was not ; and the reason of the diversity, he says is, that the estates of the former were created by law, and therefore the law gave against them remedy ; but that tenant for life, or years, came in by grant of the owner of the lands, who might provide against waste, and if

he did not, it was his own neglect. But a doubt is entertained whether tenant by the curtesy, was punishable for waste, at common law. No evidence can be adduced from any authority to prove it, for no writ appears to have been formed before the statute of Gloucester, passed in the sixth year of Edward the I. And that statute expressly declares, such tenant punishable for waste; and the writ in the register is said to be force of statute. As there is nothing but the naked assertion of Lord Coke, unsupported by any authority, we may with propriety doubt the position laid down by him, and consider that an action of waste does not lie at common law against tenant by the curtesy.

\* In regard to the question, whether this action lies against tenant for life, it is asserted by Reeve in his history of the English law, that such is the common law. He proves by the authority of Bracton, that a proceeding might be had against a tenant for life, as well as against tenant in dower, and guardian; and that Bracton lived in the reign of Henry III. and completed his treatise upon the laws and customs of England, before the fifty-second year of that king; and in which year the statute of Marlbridge was enacted; and which is the first statute that punishes waste in any instance. This is irrefragable evidence that tenant for years, was punishable for waste at common law. We must therefore consider it to be law in this state, that action of waste will lie against tenant for life, in dower, and guardian.

By the common law, if he who had the inheritance did fear that waste would be done, he might before any waste was done, have a writ of prohibition directed to the sheriff, that he should not permit waste to be done. Courts of chancery, have power to issue injunctions to prevent the commission of waste. But in this state other remedy has ever been introduced, than the action of waste, which we must consider.

† The action must be brought by him who has the immediate estate of inheritance, and is the remainder man, or reversioner. But the reversion must continue in the same state it was when the waste was done, and not be granted over, for if it be sold, or assigned, tho taken back, the action is gone, because the estate did not continue,

\* 1 Reeve, 386. Bracton, 316. 2 Reeve, 73, 148.  
† 3 Inst. 277, 299. 4 Co. Lit. 53, b.

‡ 2 Reeve, 90.

continue. If waste be done, and the reversioner dies, the action is gone. <sup>a</sup> If tenant in dower, grant over the whole of her estate, and the grantee commit wastes, yet the heir, or reversioner shall have an action against the tenant in dower, because of the privity of the estates; but if the heir, or reversioner either before or after such assignment, grants the reversion to a stranger, he may have an action of waste against the assignee, because in both cases the privity is destroyed. If tenant for life, grant over his estate and the grantee commit waste, action will lie against the grantee. Tenant for life and dower, are responsible to the reversioner, for waste committed by a stranger, while they hold the lands; because they have an action of trespass against such person. Guardian shall not be punishable for waste committed by a stranger; and if he assign over, action of waste will lie against the assignee.

Tenant for life, dower, and guardian, are by the common law liable to pay only single damages, for the commission of waste, and do not forfeit the land wasted. Guardian forfeits the wardship, by force of the statute of magna charta.

The action of waste is trespass on the case. The declaration should describe the lands, and set forth the titles of the plaintiff and defendant, and the particular acts of waste done; for which he recovers single damages, and there is no forfeiture of the land wasted.

5. Nuisance signifies any thing that worketh hurt, inconvenience, or damage. Nuisances are of two kinds, public, or common, which are an annoyance to the people in general; which will be considered when we treat of crimes; and private, which affect individuals only. These are the subject of our present enquiry, and may be defined to be any thing done to the annoyance of the lands, and tenements of another.

Nuisance is fairly comprehended under the idea of trespass. But it differs from the trespasses already described in this respect. Such are a direct damage done to the land. Nuisances result from acts which are not directly injurious, but are so in their consequence and effect. The doing of the act would in itself be lawful,

but

but as the consequence is injurious to another, it is unlawful ; for it is a rule of law, as well as of morality, that a man shall so use his own, as not to injure the property of another.

• A man's dwelling may be injured by over-hanging it, by stopping up ancient lights, and corrupting the air with noisome smells. If a man builds a house so close to mine, that his roof over-hangs my roof, it is a nuisance. So if a man builds a house so near my land, that the roof over-hangs it, or if the water from it be conducted by a pipe, so that it falls upon my land, it is a nuisance. So it is to erect a house, or other building so near mine, that it stops up my ancient lights and windows, but in this last case it must be understood, that the windows be ancient, and have been there; time out of mind, otherwise it is no nuisance ; for one has as much right to build an edifice on his own ground, as another. And every one has a right to do what he pleases upon the upright, or perpendicular of his own land ; and it is the folly of a man, to build so near the land of another, that he may injure him, by building a house upon his own land. If a person keeps his hogs, or other noisome animals, so near the house of another, that the stench incommodes him, and makes the air unwholesome, this is a nuisance, because it tends to deprive him of the use and benefit of his house. So if a person sets up, or exercises an offensive trade, as a tanner's, or tallow-chandlers, or the like, for tho these trades are lawful and necessary, yet they should be exercised in places remote, where the dwelling of no person can be injured by them. The same may be said respecting a slaughter-house. But to deprive one of a mere matter of pleasure, as a fine prospect, by building a wall, or the like ; as it abridges nothing really convenient, or necessary, is not considered to be such an injury as the sufferer, as the law will redress.

In respect of nuisances to lands, it is a general principle, that if a man does an act which is in itself lawful, yet being done in that particular place, necessarily tends to the damage of another's property, it is a nuisance ; for it is incumbent on him to find a place to do it, where it will be inoffensive. As if one erects a smelting house for lead, so near the land of another, that the vapor and smoke kills his corn and grass, or damages his cattle, this is held

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to be a nuisance. So if my neighbour ought to scour a ditch, and neglects it, by which my land is overflowed, this is an actionable nuisance. If a man builds a dam on his own land, on a stream, by which he flows the water back upon my land, action lies. If a man corrupt, or poison a water course by erecting a dye house, or lime pit for the use of trade, in the upper part of the stream, it is a nuisance, and so it is to do any act therein, that must in its consequences necessarily tend to the prejudice of one's neighbour.

• In cases with respect to the overflowing of lands by mill dams, by virtue of a general and unlimited grant to flow, at the first settlement of this country, it has been decided, that where under such grant, a person and those under whom he claims, for a great length of time, have flowed the land to a certain extent, this shall be considered as his construction of the grant and he shall not afterwards be permitted to say, that such practice is not according to the grant; and raise his dam higher, by which he may prejudice others.

• In respect to the right which the owners of land, have to the use of streams of water, running thro their lands, as relative to the owners below them, this general principle has been established, that every person may take every natural and artificial advantage of a stream of water, running through his land, either for his mills or manuring his meadows, provided that he does not deprive the adjoining proprietor below him of a sufficiency for the necessary purposes of his kitchen, to drink and to water his cattle: and provided, that the water which shall thus be diverted from its natural course for artificial purposes, shall be absorbed on his land, or return to its natural course, before the stream passes by the land of the adjoining proprietor. The reason on which this rule is founded is, that every person has a natural right to improve the water passing thro his land to the best advantage, but that he shall not deprive his neighbour of the necessary use, nor unnecessarily of the artificial use. If I can dispose of, and absorb upon my land, the whole of the stream excepting a sufficiency for necessary purposes, I have the prior right, because I am above him on the stream and have the first opportunity. But I may

not

• *Dawson vs. Fowler*, Sup. C. 1792.    • *Perkins vs. Dow*, Sup. C. 1793.

not unnecessarily, and without deriving any advantage from it so divert the stream, as to deprive him of any artificial use of it, to which he becomes entitled, if I cannot take it. These principles give to all the proprietors, from the head of the stream to the place where it empties into the ocean, the use of the water for all necessary purposes, and to every one that artificial advantage which the situation of his ground will admit.

The same rule applies where the water is used for mills, as for other purposes. Therefore when the plaintiff brought his action for the defendant's diverting a stream in his own land, from its natural course and prevented it from running to his mill, it appearing that he made use of the stream in watering his land, and that all the water which he diverted, was absorbed on the land, or returned to its natural course, before it left his land, it was held that the action would not lie.

The remedy for the injury which a man sustains by a nuisance, is an action of trespass on the case ; by which he recovers damages, but cannot remove the nuisance. He may however bring his action as long as the nuisance is continued, every continuance, being deemed a fresh nuisance, for which action lies. And if a person continues a nuisance after it has been so judged, in one action, such damages will be given in a subsequent action, as will compel him to remove it. An action lies at common law to remove a nuisance ; but is now disused in England, and has never been introduced into this state.

No action lies in favour of a private person, for a public nuisance, unless he has sustained some special damage thereby ; and then he may bring his action to recover such special damage.

While we are treating of injuries respecting real property, that come under the head of actions of trespass on the case ; it may not be improper to add a few cases, that do not come expressly under any of the foregoing divisions.

If one person owns the upper, and another the lower story of a house, the latter may compel the former, to cover the roof to save the lower room. And if either shall so use his room, as to injure

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the other, action will lie. If by negligently keeping my fire, my house is burned and communicates the fire to the house another, by which it is consumed, action will lie. So if I set fire on my own land, and suffer it to run on to the land of my neighbour by which he is injured. If I am obliged by law, to maintain a fence against the land of another, and by my neglect the fence is insufficient, and a stranger's cattle pass thro it, into the land of my neighbour, I am answerable for the injury.

In respect of chattels real, it may be remarked that lessee for years, may on account of any injury done to the land, bring the same actions as proprietor in fee, excepting for cutting timber as has been mentioned; but that tenant at will and by sufferance, have so small an estate, that they can maintain no action but those which they have power to do, by virtue of their lawful possession.

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## CHAPTER SEVENTH.

### OF REPLEVIN.

**I**N the preceeding chapter, I considered the actions that respect real property. I now propose to detail minutely every action that can be brought for any injury respecting personal property.

The first, and most natural division of actions, respecting things personal, is into actions that are founded on torts, or wrongs; and actions that are founded on contracts. Every act injurious to the personal property of another, and every violation of a contract, are the grounds of action. Correspondent to this division, we find another division of personal actions. This respects actions relating to things in possession, and to things in action. Torts respect things in possession, and contracts are the basis of things in action.

Actions founded on torts, are again divided into those which are and which are not accompanied by force. Actions for injuries accompanied with force, are replevin and trespass. Actions for injuries unaccompanied by force, are trover and trespass on the case. I shall first consider the action of replevin.

#### Replevin

Replevin is a process by which a person regains the possession of beasts, that have been impounded, which were taken damage feasant, or his personal property which has been attached. In these two cases only, have we occasion for this process by our law, as we have never introduced the practice of distraining for rent. This renders our law very different from, and much more simple than the English law on this subject. I shall first consider the replevin of beasts impounded, and then of personal property attached.

1. Whenever the beasts of a person are impounded, it is his duty within twenty-four hours after notice, and for his neglect, he incurs a penalty of one shilling for each creature, for every day he suffers them to continue in the pound, and the expence of keeping them, to replevy them. If the owner of the beasts, wishes to replevy them, he may apply to an assistant, or justice of the peace for a writ of replevin. This is directed to the sheriff, his deputy, or the constable of the town, commanding them to cause to be re-delivered to the owner, his beasts which are impounded. By force of this writ, the officer restores the beasts to the owner. Every writ of replevin, contains in it an action of trespass. The plaintiff therefore alleges, that the beasts were wrongfully impounded; the defendant is summoned to appear before some proper court, to answer for the injury. In all cases of replevin, it is the duty of the authority signing the writ, to take sufficient bonds to respond such damages as the adverse party may recover,

When the action of replevin proceeds regularly, and the parties appear in court, the defendant may deny, that he ever took and impounded the beasts; he may justify taking them doing damage on his land. In such case, the defendant makes avowry, he avows or acknowledges the taking, by averring that they were taken in his close, (which must be described) doing damage. The defendant is called the avowant, and becomes the plaintiff, because he demands damage for the trespass committed by the beasts, that have been replevied. If the plaintiff claims the land where the beasts were taken, then the title to the land may be collaterally tried, as in an action of trespass, and the right of impounding, will be dependant on the right of property. But if

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the fence thro which such beasts passed on to the land, was insufficient, then the plaintiff may on that ground contest the right of impounding. And in matters of replevin, the usual disputes respect the sufficiency of the fence ; which I shall therefore consider in this place.

• All proprietors of lands, are obliged to make and maintain sufficient fences, to secure their particular inclosures. A sufficient fence, the law determines to be a stone wall four feet high, and a five rail fence, or any other fence equivalent to it. All dividend fences, are to be made and maintained equally by the adjoining proprietors. If either party refuse to make a division, the other party may apply to the select-men, who may divide the same, and set the best part to him who erected, or holds under him who erected the same, and the party refusing to divide shall pay the expence. The account under the hands of the select-men shall be sufficient evidence to maintain the action to recover the same.

If one proprietor improve before the other, and make the whole of the fence, then when the other proprietor improves, he shall purchase and maintain half the fence. If they disagree, the select-men shall divide the fence, and determine what sum shall be paid by the proprietor last improving, to him who erected the fence ; and an account under their hands, shall be sufficient evidence in an action to recover the same. Such divisions when recorded shall be effectual in law.

If a proprietor neglects to keep his dividend fence in repair, the person injured, may call on the fence viewers, who finding the fence insufficient, or not made, may after five days notice, proceed to erect and repair the same, and the negligent proprietor shall pay double expence.

Where a person has inclosed his fields, with good and sufficient fences according to law, he may impound creatures doing damage therein, and the owner shall pay damage and poundage. But damage done by beasts thro the insufficiency of the fence, shall not be recoverable, unless done by swine, or horses suffered to go

at large on the common; or by unruly cattle, which will not be restrained by ordinary fence, or where the person voluntarily trespasses upon, or puts his creatures into his neighbour's inclosure. Then if the party injured, shall find the creatures doing damage in his inclosure, he may impound and shall recover damage and poundage, tho his fence be insufficient.

If the beasts of the adjoining proprietor enter upon my land, by the insufficiency of his fence, then they are liable to be impounded in the same manner, as if they broke through my sufficient fence. The proprietor who owns against a common, or the high-way, must make the whole fence. In case of the impounding of horse-kind suffered to go at large on the common, when the impounder has made oath to the place where he took them, the owner shall pay damage, unless he can shew that they were not suffered to go at large, or entered the field through the insufficiency of the fence, at some place not adjoining the commons. The right to impound, and to recover damages for the trespass, depends on the sufficiency, or insufficiency of the fence.

It has been decided, that where a river not navigable, divides adjoining proprietors, their lands meet in the middle of the river, and where land is so circumstanced, that a division fence cannot be built upon the line, it is a case not provided for in the statute, and must be governed by the principles of reason and justice; which is, that whoever keeps cattle, must so keep them as that they do no injury to the property or improvement of others. Therefore if one adjoining proprietor pastures, and the other mows his lands, he that pastures must make the whole of the fence.

On trial, if the issue be found in favour of the avowant, he is entitled to recover his damages and cost. If for the plaintiff, he recovers his damages and cost. If the person replevying, fail to prosecute his action, the bond is a security, by force of which, the defendant may recover his damages.

Where an injury has been done by the cattle of any one, to the lands of another, he who receives the injury may either distrain them damage feasant, or bring his action of trespass and recover the damage sustained. But he should make his election of his remedy,

medy, for if he distrains, and the distress escapes, the action of trespass is gone, unless the escape was without his default or neglect, and then it lies.

1. If the beasts, impounded should die in the pound without any neglect of the impounder, he may recur to his action of trespass to recover his damages. For this would be no satisfaction of his demand; but if they die by his misconduct or neglect, he shall have no action for his damages, because he has elected his remedy.

If any creatures lawfully impounded, shall escape out of the pound, the owner being known, he shall pay all damages and the poundage; provided that the person impounding the same, give oath that he took them doing damage; to be recovered by action of debt.

Before I close this subject, I shall mention the cases of rescue and pound-breach; which tho not directly comprehended under this head, are so nearly connected with it, as to come properly under consideration.

If any person shall rescue any creatures taken doing damage, out of the hands of any person driving them to pound, or that shall resist the driving them, or that shall by any means convey such creatures out of the pound, or custody of the law, whereby the party wronged may be liable to lose his poundage and damage; such person shall pay and forfeit twenty shillings for the rescue, and forty shillings for the pound-breach: three quarters to the town treasury, and one quarter to the prosecutor, and the damages to the party injured. And if unable to pay the damages and forfeiture, he may be whipped, not exceeding ten stripes, and assigned in service to the party wronged, to pay the damages. If it appears that there was any procurement of the owners of the creatures, that they were abettors, or if it be done by their servants, or children, the owners shall pay all damages and forfeitures, as if they had personally done the same. All complaints must be prosecuted within nine months after the offence is committed.

2. When personal property is attached, to be holden to respond a judgment that may be recovered in the action, it may be replevied.

replevied. As a considerable time may intervene between the time of attaching and rendering judgment, it may be greatly disadvantageous to the owner, to be kept out of possession till final trial. As the creditor has only a right to have his debt secured, it is no injury to him to have the estate returned, if the defendant pledge good security. Therefore if the defendant can procure sufficient bonds, he may obtain a writ of replevin; the authority granting the writ should be very cautious in taking bonds, as they become the surety for the debt, in lieu of the property, and as they are responsible, if they take insufficient bonds.

The sole purpose of this action in this case is, to regain the property attached, and there is no pretence of charging any wrong to be done by the attachment: but the same is acknowledged to be legal. It has therefore become the practice in these cases, to obtain a writ of replevin, commanding the goods to be re-delivered to the plaintiff in the replevin, by the officer, without alleging a trespass, or demanding damages, and directing the writ to be returned to the court to which the original action is returnable; by which the bond on the writ of replevin becomes a pledge for the debt instead of the property attached, and is preserved in court for the benefit of the attaching plaintiff, to whom such bond ought always to be taken. This writ therefore is framed merely to regain the goods attached, there can be no trial upon it, or any cost. It can hardly be considered in the nature of an action, but is merely a command from proper authority to restore goods that have been attached, so that the owner may have the benefit of them, upon given personal security to respond the demand.

No person has a right to replevy estate, unless he be both a party to the original suit, and owner of the estate. If my property be attached as the estate of another, on a suit against him, I may bring trespass, but cannot replevy.

## CHAPTER EIGHTH.

## OF TRESPASS.

**I**N this chapter, we are to consider the action of trespass only when applied to things of a personal nature.

In the discussion of this subject I shall consider, 1. The injuries to personal property, for which action of trespass lies. 2. In what cases it lies. 3. By whom the action must be brought. 4. Against whom it must be brought. 5. And the pleadings in general.

1. In the respect of the injuries for which trespass may be sustained, it may be laid down as a general rule, that all unlawful acts that injure things personal, either by the taking them away from the owner, by destroying them, or by damaging them, are deemed trespasses. It would be impracticable to specify every act that may be done, that would come within the legal definition of trespass; but the general principle being known, it is easy to apply it to particular cases. We must remember what the things are, in which the law admits an ownership. Every unlawful act that is done by a person to any moveable thing, in which by law property can be acquired, that is in any possible shape a damage to it, is a wrong, for which action lies. Of course all animals of a wild nature, cannot be the subject of trespass before a qualified property is acquired.

A person may do an injury to the personal property of another, not only by his own act, but by the instrumentality of something else. For instance, if I set my dog upon the beasts of another, by which they are injured, action lies. <sup>a</sup> If I chase beasts that are doing damage, out of my enclosure with a little dog, it is no trespass. <sup>b</sup> But if I chase them with a mastiff dog, and they are injured, it is a trespass, because such a chasing is unlawful.

<sup>c</sup> By the common law, if a dog kill a sheep, no action lies unless the owner knew that he was accustomed to bite sheep. But by the statute, the owners of dogs are liable to pay for the sheep they kill, tho ignorant, that they are addicted to such practice. If a beast,

<sup>a</sup> 2 Roll. Abr. 566. <sup>b</sup> Cro. Cir. 254. <sup>c</sup> Dyer, 25.  
<sup>d</sup> Bro. Tresp 34. 2 Roll. Abr. 569.

beast, or any property be taken away, and then retaken or restored, action lies; and the retaking and restoration only go in mitigation of damages.

2. As to the cases in which actions of trespass will lie, it may be observed; *a* that wherever an injury has been received from an act which was in the first instance unlawful, an action of trespass lies, altho the act were not accompanied with actual force, there being in every such case an implied force. But where the injury which has been received, was the consequence of an act which was in the first instance lawful, action of trespass does not lie, the proper remedy, being trespass on the case.

But there are some instances, where an act which was in the first instance lawful, becomes afterwards a trespass from the beginning. Wherever a person who first acted with propriety under an authority, or licence given by law, does afterwards abuse the authority, or licence, he becomes a trespasser from the beginning. *b* If a person who has distrained, or impounded a beast doing damage, afterwards kill, or use the beast, he becomes a trespasser from the beginning. He had by law an authority to distrain the beast; but as this extended only to keeping it as a pledge, to enforce the making satisfaction for the damage, the killing, or using the beast was an abuse of the authority. The same rule would extend to property attached. *c* Any act done that is beneficial to it, or for its preservation, may be justified; but any act by which the nature of the property is changed, as tanning raw hides, would make the person a trespasser from the beginning. *d* Where a person had a warrant from a justice of the peace, to search a house for stolen goods, pulled down the cloaths of a bed, in which there was a woman, and attempted to search under her shift, it was holden that by this indecent abuse of his authority, he was a trespasser from the beginning.

*e* It is a general rule that a man who has been guilty only of a negative abuse of his authority or licence by law, does not become thereby a trespasser from the beginning; because he has only been guilty of a non-feasance. As if a man who lawfully went into an inn, refuse to pay for the liquor he has called for, this is a negative

*a* 1 Strang. 636.  
*e* 8 Rep. 146.

*b* 8 Rep. 145.

*c* Cro. Eliz. 783.

*d* Clayt. 44.

abuse of a licence given him by law to go into the inn, he is not therefore a trespasser from the beginning.

But there are some instances in which a man who has only been guilty of a negative abuse of an authority given him by law, does become a trespasser from the beginning. \* If a sheriff have not returned a writ which ought to have been returned, he becomes, altho this be only a non-satisfaction, a trespasser from the beginning, as to every act done under the writ.

The person who is guilty of an abuse of authority in fact which is given him by another, does not thereby become a trespasser from the beginning. † As if the bailee of a beast delivered to him to be kept, kills or uses it, he is liable to make satisfaction for the abuse of the authority given him by the owner, but he does not thereby become a trespasser from the beginning; because the owner was under no obligation to repose such confidence in him, and if he will trust a person that is guilty of an abuse of the authority, it is his own folly, and it will be sufficient to make him answerable for the wrongful act alone. But where the law has given an authority to any one, it is necessary to secure such persons as are the objects of it, from abuse of the authority by rendering every thing void done under it when it is abused, and leave the abuser in the same situation, as if he had no authority; for the maxim is, that the act of the law works no man an injury.

\* As to officers entrusted with an authority by law, the general rules are; where the subject matter of any suit is not within the jurisdiction of the court applied to for redress, every thing done is absolutely void, and the officer executing the process is a trespasser. But where the subject matter is within the jurisdiction of the court, but the want of jurisdiction is to the person or place, unless the want of jurisdiction appear on the process to the officer who executes it, he is not a trespasser.

The rule of justification under process of any court is, that if the court has jurisdiction, and their proceedings are irregular, trespass lies against the plaintiff in the action for taking the goods, but not against the officer. If the court has not jurisdiction, the officer is liable.

Trespass.

\* *Ld. Raym.* 632. † *Brok. Tresp.* 295. \* 2 *Rfp. Dig.* 72, 73.

Trespass will not lie against a mere ministerial officer, for any thing done merely in pursuance of his duty, tho it is somewhat in support of a wrong, but a wrong to which he is no way assenting, or accessory. \* As where a distress was tortiously taken and impounded in the pound, of which one of the defendants was keeper, and an action was brought against those who took the distress, and the pound keeper. The action was holden not to lie against him, for he acted merely ministerially, and was no way concerned in the tort. But in this case if he had exceeded his duty, and assisted in the wrong, and assented to the original trespass he would have been a party in the trespass.

b Wherever the law gives any persons power to do any act, so long as they confine themselves within the limits of the power delegated to them, they are protected by law ; but if they exceed their power, or go out of their jurisdiction, they are amenable for every such act to the party injured by it.

c In all cases where courts hold cognizance of matters not within their jurisdiction, their proceedings are void, and trespass lies either against the officer, or against the person who applies to their jurisdiction, and acts under their decisions.

d Search warrants if issued properly, and on proper application, are legal ; but must issue under certain restrictions. There must be an oath. The ground declared. It must be executed in the day time, by a known officer in the presence of the party informing. And tho all these precautions be observed, the person on whose information the warrant issued, is liable to an action of trespass if nothing be found, for breaking and entering the house ; for he is justified, or not, by the event.

3. e Actions of trespass may be brought by persons that have either the general or special property in the thing. The person who has the general property in things personal, may have an action for any injury done to them by a stranger, tho he never had actual possession, and tho they were at the time the damage was done in the possession of a person that had the special property ; for a general property in things personal draws to it a possession in law, by reason of their transitoriness sufficient to warrant this action.

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\* Cowper, 476.

b 3 Will. 467.

c 2 Will. 384.

d Hale's, P.C. 150.

e Bro. Title Tresp. 303. 2 Bull. Abr. 369.



c Every person who is answerable to another for personal estate in his possession, has such a special property in it as enables him to maintain an action of trespass, for the taking or injuring of it by a stranger. But where goods are delivered to bailee generally to keep, and he is not answerable to the owner, unless they are lost, or injured by his neglect or default, he cannot maintain trespass for any injury done them by a stranger.

d In all cases, the person having the general, or special property, may bring this action ; but a recovery by one, shall bar the other ; for there shall be but one satisfaction for the same trespass.

4. We are to consider against whom actions of trespass may be brought. c This action will lie against a lunatic, tho incapable of design, for whenever a person receives an injury from the voluntary act of another, it is a trespass, tho there was no design to injure. This action will also lie against infants and married women.

d Every party to a trespass, is liable to an action, for there can be no accessory in trespass, for every trespass is in its nature joint and several. The action may be brought against one or all ; but if the person injured bring his action against one, he cannot bring a second against another, and tho the defendant in the second action be a stranger to the record in the first, yet being a party to the trespass, he may plead the pendency of the first action in abatement to the second, or the acquittal or judgment in the first action in bar to the second.

When more trespassers than one are joined in a suit, and judgment against them all, the recoverer, may collect the damages of either of them, as he may think proper, and the person of whom it is collected, has no remedy against his fellow trespassers, for the rule is, that there is no contribution in trespass. This rule seems hardly to be founded in equity, for when the judgment is rendered against all, it seems reasonable that each should pay his proportion, and at no rate can it be just, that the recoverer should have the power to determine that one should pay the whole, and the rest be exonerated ; for in this way, by a collusion between the recoverer and part of the trespassers, perhaps the most guilty,

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a 1 Inst. 89. Bro. Tresp. 83. b 2 Ro.L. Abr. 569. c Bro. Tresp. 283. d Idem, 113. 8 Rep. 159. Hob. 137.

the whole burden may be thrown upon the most innocent, without a possibility of redress:

*c* If one person command or request another to take the goods of a third person, and he does it, action lies against both. *b* If one person agrees to a trespass committed by another for his benefit, action lies against him, tho it was not done by his command or request. *c* But if a person be compelled to commit a trespass, he is not liable to this action, for no person can be guilty of a trespass unless he acts voluntarily. But the person compelling another to commit a trespass, is guilty of the trespass, and liable to an action.

*d* Where personal property is delivered to a person to keep, as baillee; the baillee is not responsible in trespass to the owner, for any injury, unless there be a deviation from the particular purpose for which it was bailed; but for all the injuries that are done, the baillee is answerable in an action on the case. If a horse be delivered to a person for a particular purpose, as to plough his land, then if he kills him, he is liable to an action of trespass, but if the horse was delivered to him generally to keep, then if he kills him, he is not liable in trespass, but case. *e* If the bailor take away property before the time has expired for which it was bailed, case only will lie against him; for he who has the special property can never maintain trespass against him who has the general property.

*f* If a servant exceed, or vary from the command of his master, or the trust, or power given him, he is a trespasser. *g* So if a servant distrain a horse by the command of his master, and then use or kill the horse, the master is not liable to an action of trespass, but the servant is, and becomes a trespasser from the beginning.

#### 5. Of pleadings in trespass.

*a* In all cases of trespass, the facts must be alledged to be done with force and arms, or words must be used of that import. By the common law, they should be alledged to be against the peace. This was proper when the defendant was liable to be fined, or amerced in an action of trespass. But as by our law, the defend-

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*a* Salk. 409. *b* Bro. Tref. 113. *c* Style, 65. *d* Bro. Tref. 295.  
*e* 1 Inst. 57. *f* Bro. Tref. 92. *g* Bro. Tref. 295, 5 Repr. 14. *h* Bro.  
 Tref. 271. *i* Salk. 636.

ant is guilty of no crime, and liable to no punishment, it is unnecessary to lay the facts done, to be against the peace.

<sup>a</sup> The plaintiff in his declaration, should declare that he is the owner of the property in question, or at least that he has the lawful possession; but if he declare upon a general property, and prove a special, it is good. The goods taken, or injured, should be described in the declaration, so that their identity can be ascertained, for to declare of goods generally, is ill. A price and value should be put upon them, and the time of doing the injury be mentioned. <sup>b</sup> But the day is not material that is laid in the declaration, and the plaintiff is not bound to prove the defendant guilty on that day, but may prove him guilty on any other day before the bringing the action and within the time limited by the statute of limitations, and it shall be good.

<sup>c</sup> When the trespass arises from an abuse of an authority given by law, or a tort done subsequent to a lawful act, it is sufficient in the declaration to state a trespass generally, and then if the defendant plead a special justification, the particular injury, or abuse shall be stated in the replication. As where the plaintiff declared generally for breaking his house, and carrying away his goods; the defendant justified the taking, as a distress, damage feasant, the plaintiff replied, that the distress, the defendant had converted them to his own use. The defendant demurred because it was a departure; but the court held otherwise, for the abuse of the authority made him a trespasser from the beginning; which need not be specially stated in the declaration, but may come out in the replication.

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## CHAPTER NINTH.

### OF TROVER.

**T**ROVER is an action, in the nature of an action of trespass on the case, which lies where one man obtains possession of the goods of another, by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells, or converts them to his own use, without the consent of the owner; for which the owner

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<sup>a</sup> 2 Esp. Dig. 93, 95.    <sup>b</sup> Co. Lit. 283.    <sup>c</sup> Salk. 221.

by this action recovers the value of his goods. In this action, the defendant is supposed to have come legally into possession of the goods, and the wrong done, or the gift of the action, is the illegal conversion of them to his own use, without which the action cannot be maintained.

The word trover, is derived from a French word, which signifies to find. Originally this action was brought only in cases of finding, but the convenience of it, induced courts to extend it to other cases of a different nature, and the form of the declaration has been to alledge a finding by the defendant, when actually there was a tortious taking. This action superceded the action of detinue at common law, which was brought to obtain a specific reparation of the thing. It is wholly obsolete in England, and has never been introduced into this state.

In respect of the persons who may bring this action, and against whom it may be brought, the general rule is the same as in the action of trespass—We need only remark in addition, that as in trover, the defendant is supposed to come lawfully by the possession of the goods, there are certain cases in which he has a lien upon them, and may retain them till his demand is satisfied.

The doctrine in favour of liens, courts have much leaned to of late years, for the convenience of trade, allowing them where there is an express contract to that effect, and where it is implied either from the usage of the trade, or the manner of dealings between the parties.

\* A factor has a lien upon goods consigned to him, not merely what is due for those goods, but for the balance of a general account, and for which he may retain them. So he has a lien upon money in the hands of the buyer of goods, which he sold him being the goods of the principal. So if goods had been consigned by a trader to a factor, and the factor knew that the trader was in insolvent circumstances, but he nevertheless advanced him money on the credit of the goods, he has a lien upon them for the money he advanced.

† In the case of manufacturers, the lien which they have upon the

a 4 Burr. 222r. Cowp. 251. 2. Burr. 932. 1 Black. Rep. 193.  
b 1 Alk. 235. 4 Burr. 2214.

the goods entrusted to them to manufacture, is not a general one, but confined to the work done on the goods themselves, unless express usage of the trade is proved to the contrary. As a manufacturer who takes goods for a particular purpose, as to die them, has a lien on them for the work done to the goods themselves, but cannot retain them for any other demand against the owner; tho the demand be for similar work before done on similar goods, and delivered to the owner.

*a* But the usage of trade will create a general lien. As where it was proved to be the usage for packers to lend money to clothiers, and the cloths left to be packed were considered as a pledge not only for the packing, but for the loan of money likewise; and here the bankrupt who was a clothier, borrowed money on a note of hand from the petitioner, who was a packer, but at a time when he had no dealings with him, and the bankrupt having afterwards sent him cloth to pack; it was held; that he might retain the cloth for the debt, as well as for the price of packing.

All pawns from the nature of the transaction create liens. *b* An inn-keeper has by law a right to detain a horse left with him, till he is paid for the keeping. For as he is by law compellable to receive a guest and his horse, he shall have this remedy. And tho in this case, the horse had been brought to the inn by a stranger, without the owner's knowledge, and was afterwards claimed by the owner, yet the inn-keeper was allowed to keep the horse till paid; for so by pretended ignorance, that the horse was sent to an inn, the owner might defraud the inn-keeper, by getting his keeping for nothing. *c* So that to give this right of retainer it is not necessary that the owner should be a guest, for merely leaving the horse at the inn, gives the inn-keeper the right of retaining till paid for his keeping. *d* But this right of retaining is only while the horse remains in the inn-keeper's possession, for if he suffers the horse to be taken away, and the horse is brought again to his inn, he cannot retain him for the former demand.

*e* A carrier may detain goods entrusted to him to carry till he is paid for their carriage. *f* But this rule of lien being admitted for

*a* 1 Alk. 227, 222. Pre. Chanc. 520. *b* 1 Roll. Rep. 419. *c* Salk. 388. *d* 1 Strange, 557. *e* 2 Ld. Raym. 752. *f* Cro. Car. 271.

the benefit of trade, it shall be confined to that only. A person therefore may not detain cows for their keeping. And in general, no person can in any case retain where there is a special agreement to pay.

A few cases more may be added under this head, respecting the persons who may sue or be sued in trover.

a Trover will lie against the master for goods which were delivered to the servant; but in such case, it must appear that the goods came to the hands of the master, or that the servant was usually employed by the master to receive the goods in the way of the master's trade. As where a pawn was delivered to a pawnbroker's servant, and which being lost, the pawnbroker recovered in trover against the master: So trover will lie against the servant himself for disposing of another's goods, tho to his master's use, and that whether he has any authority from the master or not.

b One tenant in common or joint tenant cannot have trover against his companion, for the possession of one is the possession of all. c If one tenant in common destroys the thing held in common, the other may have trover against him for it—for that is a total conversion to his own use of what he had only a part.

d Trover will lie against husband and wife, whenever the conversion has been by the wife, before coverture, or by herself after coverture, for it being a tort by her, she shall be joined with her husband in the action; but if the conversion be after coverture, it must be alledged to the use of the husband only.

Trover will lie against two or more persons; e and when a person has been subjected to pay for any article of property in this action, he thereby becomes vested with the ownership of it.

As to the cases in which this action will lie, it is to be observed that this action is calculated and designed to ascertain and decide the right of property in things personal, and will generally lie where one person has obtained property from another, and converted it to his own use. Where a dispute arises respecting the validity of a sale, the question is usually settled by this action.

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a 1 Strange, 505. Salk. 441. 1 Ld. Raym. 738. 1 Wilson, 318.  
b Salk. 290. c Co. Lit. 200 a. d Yelv. 165. e Strange, 1078.

As if a person claims to hold property by purchase of another, and the original owner contends that it was stolen from him, or taken from him wrongfully, or that the seller had no authority to make the sale. If a creditor contends that his debtor has disposed of his estate without consideration, in a fraudulent manner with design to defraud his creditors, he may levy his execution for his debt upon it, and cause it to be sold in satisfaction of his debt, and then the purchaser brings his action of trover; by which in those cases the title to the thing in question is decided.

This action does not lie where there is merely an injury, or abuse done to the personal estate of another, as wounding, or killing a horse. In these cases, trespass is the proper action.

Trover lies only in those cases where the thing has been taken, and converted to the use of the wrong-doer. If a person acquires possession of my property lawfully, as by hiring, borrowing, bailment or finding, and refuses to deliver it to me on demand, and converts it to his own use, this action lies. Where a person obtains my property wrongfully, and by force, trover lies against him to recover the value of the article taken. Trespass will lie in the same case to recover damages, not only for the value of the article but the injury arising from the deprivation. And this seems to be the distinction between these actions. Trover is designed to recover the value of the thing, and trespass the damages. Trover will lie in all cases where trespass will lie for a tortious taking of goods; but trover waves any challenge for damages on account of the force. Trespass will never lie, where the original acquisition of the possession of the goods was lawful, unless some act be done which renders the person a trespasser from the beginning. Action of trover lies for every thing capable of ownership that is of a personal nature, and in all cases where one person detains the property of another without lawful right, tho he obtained it lawfully.

\* An action of trover lies, tho the goods converted be afterwards restored to the owner, for the restoration only goes in mitigation of damages.

Conversion may be expressly evidenced by an actual use and disposition

~~disposition~~ and by a tortious taking, and may be implied from a demand and refusal.

When a person comes lawfully by the possession of the goods of another, the actual using and improving of them as his own is a conversion. *a* If a man rides a horse that he has lawfully distrained, this is a conversion. So it is if he wears *b* wearing apparel that he found, or that was delivered to be kept. But if any damage happen to them by his neglect, it is no conversion. *c* If a person finds goods and loses them again, or they are taken from him, he is not guilty of a conversion, because he does not dispose of them as his own. *d* If the corn of one man be carried to mill by another, and the owner forbids the miller to grind it, and he does, this is a conversion. *e* If one man after drawing part of the wine of another out of a vessel, put as much water into the vessel, as he drew out wine, this is a conversion of all the wine, because the whole is thereby damaged, if not spoiled. *f* If goods, in order to prevent the sinking of a ship, are thrown by the master of the ship into the sea, this is not a conversion; because so far from disposing of the goods as if they were his own, the master only does what is necessary for the preservation of the ship, and the lives on board.

*g* A tortious, or unlawful taking of goods, is a conversion. So is every unlawful intermeddling, or assuming by one person to dispose of the goods of another, as if they were his own.

But as there are instances in which it is impracticable to prove a tortious taking, or an actual conversion, the law has furnished a mode of proof by demand and refusal. If therefore I demand my goods of a person who has the possession of them, and he refuses to deliver them to me, this is considered as presumptive evidence of a conversion; and is sufficient, unless the defendant can avoid it by other circumstances.

*b* In respect of the form of the declaration, it may be remarked, that in trover, the conversion is the gist of the action, and the manner in which the goods came into the defendant's hands, is but inducement; the plaintiff may therefore declare generally, that they came into his hands, or specially by finding (even tho in

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*a* Cro. Jac. 148. *b* Cro. Eliz. 219. *c* 1 Roll. Abr. 6. *d* Clayt. 57. *e* 1 Roll. Abr. 6. *f* 2 Bull. 280. *g* 6 Mod. 212. Clayt. 212. *h* 2 Espin. 250. *i* Bull. N. P. 33.



fact the defendant came to them by delivery,) or that the defendant fraudulently obtained them, as by winning them at cards from the plaintiff's wife, and this being inducement, need not be proved; but it is sufficient to prove property in the plaintiff, and possession and conversion by the defendant.

*a* The declaration should describe the goods with sufficient certainty, so that they may be known, and the defendant be able to make his defence against the challenge, and be pleadable in bar to another action for the same thing. A declaration for one parcel of pack-cloth, without setting out the exact quantity, and for fifty pieces of timber, has been held to be good. *b* The declaration must state the time, but the same latitude is given in point of proof, as in trespass. *c* It is usual to mention the place which is not necessary by our law, tho it is in England, but the action is transitory, and may be laid in one place and proved in another; and the price and value of the goods, tho not absolutely required by the common law. *d* An administrator may declare that he was possessed of divers goods and chattles, as of his own proper goods, and tho they were the testator's in fact, yet the declaration is good.

*e* As to the evidence to be produced by the plaintiff, it is to be observed, that as this action equally lies where the taking has been tortious, or where the defendant has lawfully obtained possession of the plaintiff's goods, and afterwards converted them, what shall be evidence of a conversion in these two cases seems to be different. For when an actual taking of the goods in question is given in evidence, that is sufficient without shewing a demand and refusal; for it is an actual conversion: but when the defendant comes to the goods by finding, delivery, or bailment; for example, there an actual demand and refusal must be shewn, to establish a conversion, unless an actual conversion can be proved, in which case it is not necessary to prove a demand. For a demand and refusal in such case is sufficient evidence of a conversion. But it is not of itself a conversion, and a refusal on demand, may be justifiable, and lawful under particular circumstances. As if a person finds my goods and I demand them, and he answers, that he knows not whether I am the true owner, and therefore refuses to deliver them; this is

not

*a* 2 Strange, 809.  
*e* Espin. 338.

*b* 1 Vent. 135.

*c* Salt. 290.

*d* Latch. 214.

not to be deemed a conversion to his own use, as he keeps them for the owner. So in all the cases before mentioned, where a person has a lien upon the goods, he may lawfully refuse to deliver them when demanded, till his debt be satisfied.

A demand and refusal is only presumptive evidence of a conversion, for if it appears that there has been no conversion in fact, this action will not lie. As in trover against a carrier for goods, which appear either to have been lost, or stolen; in such case denial is no evidence to support the conversion necessary to this action, since the contrary is proved, tho the carrier would be liable under the custom of the realm, but if this did not appear, or the carrier had the goods in his custody when demanded, this had been good evidence of a conversion.

So, if the defendant had cut down the plaintiff's trees, and left them on the ground, this could not amount to a conversion, since it is plain they were left in the plaintiff's possession. A demand of satisfaction for goods taken, and a refusal, has been adjudged sufficient evidence of a conversion, tho there was no demand of the goods themselves.

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## CHAPTER TENTH,

### OF TRESPASS ON THE CASE.

**T**RESPASS on the Case, is an action brought for the recovery of damages, for acts unaccompanied with force, and which in their consequences only are injurious. For tho an act may be in itself lawful, yet if in its effects or consequences it is productive of any injury to another, it subjects the party to this action. As where the defendant put up a spout in his own ground, this was an act lawful in itself, but when it produced an injury to the plaintiff by conveying the water into his yard, trespass on the case was adjudged to lie for such consequential injury. So shooting of a gun which in itself is an indifferent and lawful act, yet when by it, the plaintiff's decoy was injured, this action was held to lie.

c It is not necessary to maintain this action, that the injury which

the  
 a 2 Espin Dig. 364.    b 1 Strange, 334.    c 2 Espin. Dig. 364.

the plaintiff has sustained, should arise from some act of the defendant, for the action equally lies where the injury has been caused by the neglect, or culpable omission of any duty it was incumbent on the defendant to perform. \* As if one retains an attorney to conduct his suit, and in consequence of any neglect, the party suffers any loss, this action lies against the attorney for such neglect. So if a person suffers the ditch, which borders his neighbour's land, to become so foul that the water will not run, whereby his neighbour's land is overflowed, this action lies for such culpable omission of which he was bound by law to do.

† But to charge a person in this action for any neglect the law must have imposed a duty upon him, so as to make the neglect culpable. As if a person finds any thing, he is under no obligation by law to keep it safely, and if it be spoiled while in his possession, no action lies, for there was no duty by law on him to take any degree of care.

‡ It is no excuse for the defendant, that the injury was involuntary on his part. For if any damage is caused to another, for the want of due care and attention, or by the folly of the defendant, this action lies. As if a person brings an unruly horse to break in a place of public resort, tho he might not intend to do an injury to any person, yet if any one is kicked, or otherwise hurt by the horse; he shall have this action, for it was folly and want of care to bring him to such a place, for such a purpose.

§ So neither is it any excuse, that by proper attention the person who receives the injury might have avoided it. As if a person lays logs of wood across the highway, through which a person by proper care might ride with safety, yet if the horse stumbles over them and the person is thrown, he may recover in this action for the injury.

But if the injury which the person has sustained, arises from his own neglect and folly, and might have been avoided, no action lies. ¶ As where the plaintiff declared he was employed by the defendant, to carry a load of timber to a certain place, and to lay it down where the defendant appointed; that he carried it and the defendant having appointed no place where it was to have been laid down,

\* Finch's Law, 188. † Cro. Eliz. 219. ‡ 2 Lev. 172. § Cro. Jac. 446. ¶ 2 Lev. 196.

down, the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled; after a verdict for the plaintiff, judgment was arrested—for it was the plaintiff's fault that he did not take out his horses and lead them about, or he might have unloaded the timber in any proper place, and returned.

Wherever a right is of a public nature, that is in common to all the people, the mere depriving the public of that, will not subject the party to an action, for so would actions be without end; and the remedy must be by a public prosecution. But if any individual suffers a particular injury in consequence of being deprived of such right, he may have his action on the case. So where the matter is of a public nature, but confined to a particular body, this action will not lie in favour of each individual.

Every person employing another in any office, or employment, is answerable for his misconduct or neglect, or for any injury which he may occasion. Therefore a master shall answer for the misconduct of his servant.

Such are the general principles respecting this action. I have already had occasion to treat of injuries of this description, as they respect the person, and things real. It only remains for me to consider this action as it respects things personal. For this purpose, I shall consider the injuries that arise from the misconduct, or neglect of public officers, as 1. Sheriffs, and constables. 2. Attornies. 3. Justices of the Peace. And the injuries that arise from the misconduct, or negligence of private persons. 4. Breach of Trust. And 5. Deceits.

1. We are to consider the injuries arising from the misconduct and negligence of sheriffs and constables.

In all cases of neglect, or default of performing their duty by deputy sheriffs and goal-keepers, action will lie either against them, or against the sheriff—Constables are responsible for themselves in the same manner as sheriffs.

Sheriffs are liable in cases of, 1. Escape. 2. Rescue. and 3. False Returns.

In

1 Salk. 12. 2 Co. 72. b. 1 Ld. Raym. 737. 2 Salk. 441. 2 Stra. 1004.

1. In treating of escapes, it is necessary to consider what is legal arrest—what is an escape—in what cases, and how far the sheriff is liable—what shall excuse him, and how he may have redress.

1. What shall be deemed a legal arrest. *a* Bare words will not make an arrest, there must be an actual touching of the body, or what amounts to the same thing, a power of taking immediate possession of the body, and the parties submission thereto, And therefore in the case where the officer said to the person against whom he had the writ, he being at some distance, that he arrested him by a warrant that he had against him, and such person having a fork in his hand, kept the officer at a distance, till he retreated into the house, this was held to be no arrest. *b* So where an officer having a writ against a person, met him on horse-back and said to him, you are my prisoner, upon which he turned back and submitted, this was held to be a good arrest, tho the officer never laid hand on him. But if on the officer's saying these words, he had fled, it had been no arrest unless the officer had laid hold of him.

*c* The arrest must be by authority of the officer, to whom the writ is directed, that is, he must be in company, but he need not be the hand that arrests, nor present, nor in the sight of the party arrested; as where he sent his follower or assistant forward, who made the arrest, he being at some distance and out of sight, the arrest was held to be good.

*d* It is not lawful to break open doors, to make arrest in any case of civil process, for the law will not allow such breach of peace. Therefore where officers rapt at a door, and on its being opened to see who was there, rushed forcibly in with their swords drawn, the entry and arrest, were held to be unlawful. But if in such case, they had entered peaceably, without doubt the arrest had been good.

The law considers every man's house to be his castle, where he may protect and defend himself and family, in peace and safety: and that it is better policy to permit a person to screen himself from civil process, by confining himself in his own house, than to suffer

*a* 1 Salk. 79. *b* Bull. N. P. 62. *c* Cowp. 67. *d* 3 Co. 92.

suffer his house to be broken open, by which his family and property may be exposed to injury. <sup>a</sup> But this protection and privilege extends only to the outer door. Therefore if the officer finds the outer door open and enters peaceably, he may break open inner doors to make an arrest. This has been allowed where the defendant was a lodger, and had separate rooms, which were contended to be his dwelling-house; but it was held that the privilege only extended to outer doors.

<sup>b</sup> Tho a person has been illegally arrested, as by the officer's breaking into the house, yet if while in such illegal custody, he is fairly charged with another arrest, such last arrest shall be good; but there must be no fraud or collusion, first to arrest the person unlawfully, and then to charge him with another action.

No arrest can be made in civil cases on Sunday; <sup>c</sup> but the bail may take their principal on Sunday, and surrender him the next day. <sup>d</sup> If a person is in custody of the sheriff for one cause, delivering to him a writ against the same person for another cause, is a good arrest. Where a person is illegally arrested, courts may discharge him.

2. What shall be deemed an escape. In all cases on mesne process the officer arresting a person, may suffer him to go at large, and so may the keeper of the goal, and if he surrender himself upon the execution that shall be obtained against him, there is no escape; because in such case the officer and goal-keeper may be considered as bail for the defendant. But if he does not surrender himself on the execution, then they would be liable for the escape. So if an officer arrests a person on an execution, he may suffer him to go at large, and if at any time within the life of the execution, he commits him to goal, there is no escape. <sup>e</sup> A written contract taken by an officer from the third person after levy of the execution, that the debtor shall be forth-coming in the life of the execution, is valid; and the suffering him to go at large is not an escape. But if an officer once arrest the debtor, and then suffer him to go at large, and does not commit him within the life of the execution, it will be an escape.

When a person is once committed to goal, he is to be kept in

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<sup>a</sup> 2 Cowp. 1.      <sup>b</sup> 2 Black. Rep. 823.      <sup>c</sup> Salk. 626.      <sup>d</sup> 5 Co. 39.  
<sup>e</sup> Clark vs. Lewis, Sup. Court 1790.

close and strict confinement, to compel him to pay the debt, and if he is suffered to go out of the liberties of the prison, it is an escape.

An escape may be either voluntary, or negligent. A voluntary escape is where the officer, or goal-keeper voluntarily suffers a prisoner to go at large, and depart from the liberties of the prison. A negligent escape is effected by the carelessness and negligence of an officer.

Every sheriff on being appointed to the office, is bound to take notice of all the prisoners in custody, at that time according to law, which were committed in the time of his predecessor. And no sheriff can be liable for an escape, unless the person who has escaped has been in actual custody, either of himself or some of his officers.

3. In what cases, and how far the sheriff is liable. *a* Where the process is void, no action lies against the sheriff for an escape, but it will where the process has been erroneous or irregular only. *b* Where the arrest is founded on a void judgment, the plaintiff cannot recover for an escape, but it is otherwise where the judgment is erroneous. When a court renders judgment that has jurisdiction, the judgment may be erroneous, but is not void; but if the court has no jurisdiction, the judgment is void.

The sheriff, or other officer are liable both in the cases of voluntary, and negligent escapes. Trespass on the case only lies against officers, in all cases of escape, whether on mesne process, or execution.

4. What shall excuse the sheriff, and how he shall have redress. *c* Nothing can excuse a sheriff or constable for a voluntary escape. He is liable to the party, who however does not lose his remedy against the person escaping, but the officer can maintain no action against the party, for a voluntary escape. The creditor may maintain an action against the party voluntarily escaping, tho he has recovered against the sheriff or goal-keeper, where he recovers a less sum than the debt; because in an action against the officer, it is left with the jury to determine whether they will assess damages to the amount of the demand. And if they find the party escaping, able to pay, they may assess less damages than the debt, against the officer, and leave the party to his remedy against him who escaped.

But

*a* Salk. 473. Cro. Eliz. 128. & Carth. 148. *b* 3 Cok. 52. *b* & Wms. 295. Bull. N. P. 69.

<sup>a</sup> But in the case of negligent escapes, the sheriff or goaler, may at any time retake the prisoner. Tho if the defendant escapes out of prison, and the plaintiff sends a discharge, while he is so at large, the goaler cannot justify retaking him for his fees.

The prisoner must be taken on fresh suit to excuse the sheriff; and tho he may have been out of sight for a day and a night, yet may the recaption be deemed fresh suit, and the sheriff excused; and tho the prisoner may have fled into another county, yet may the sheriff there pursue him, and retake him on fresh suit. <sup>b</sup> But the recaption must be before the action brought, or it shall not be deemed fresh suit; where it appeared that the recaption was not till after the action had been commenced, the officer was held to be liable.

<sup>c</sup> In all cases where an escape from prison happens through the insufficiency of the goal, the sheriff is excused, and the county are liable to pay the expence. In these applications, courts seem to have adopted the principle that they may take into consideration, the circumstances and ability of the person escaping; and if he has taken the poor prisoner's oath and be a complete bankrupt, so that there was no probable prospect that he would ever have paid the debt, they will give very small damages.

The remedy in these cases is by petition to the county court, and on their denying relief, an appeal lies to the superior court, who may award damages and costs.

The county are liable for no escape from the goal, that happens by any default or negligence of the sheriff, but only where it happens by any defect or insufficiency in the goal.

All persons who escape from goal, or who are aiding and assisting others in breaking, or escaping from the goal, are liable in an action to the party, at whose suit the prisoner was confined.

If the party be in custody on execution or otherwise, escapes, the sheriff may have an action of trespass on the case against him, for the sheriff is liable over to the plaintiff in the action. And this action is maintainable by the sheriff against the party escaping, tho he himself has not been sued for the escape. For the party es-

<sup>a</sup> Bull. N. P. 69. <sup>2</sup> Strange, 908. <sup>b</sup> Cro. Eliz. 657. <sup>2</sup> Strange, 873.  
<sup>c</sup> Statutes, 97.



escaping, did a wrong by the escape, and the sheriff always is liable to the plaintiff in the original action, and perhaps the person escaping might die, or leave the country before the sheriff was sued; and so he might lose his remedy.

An action will lie in favour of the sheriff, against any person that shall aid and assist another in an escape.

2. Of rescues. \* If a sheriff arrests a person on mesne process, and he is rescued in going to goal, the sheriff is not liable; for as the sheriff, if he meets the party against whom he has a process, is bound to arrest him, if pointed out to him; and as he cannot be supposed to have the power of the county with him in all cases of mesne process, he shall not be liable for a rescue.

b But if such person be once within the walls of the prison after such arrest on mesne process, the sheriff shall in all cases be liable, except where the rescue is by public enemies: but if a party of rebels, or traitors break the prison, and let the prisoners at large, the sheriff is liable on this ground, that he may always command the power of the county, and no power shall be deemed greater than that, except common enemies; besides he may have remedy against rebels, or traitors by law, but not against common enemies. The same rule of law, applies in cases of final process and execution—for wherever the sheriff has time to prepare the power of the county, he shall be liable in case of a rescue.

c In case of a rescue, the party at whose suit the arrest was made, may maintain his action either against the sheriff, or the rescuers. If therefore, he elect to proceed against the rescuers, it should seem that the sheriff is discharged.

3. Of False Returns. An officer is liable in all cases where he makes a false return, and where he makes no return—but in the case of an execution, if he pays the money to the creditor, no action lies against him for not returning it.

2. Attornies in consequence of any neglect, mismanagement or corruption, by which the client suffers any loss, either in his suit or otherwise, shall be liable to pay all damages to the party injured. \* As where the defendant was an attorney to

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the plaintiff, in a cause wherein the plaintiff had a verdict, and the defendant in that action having surrendered himself in discharge of his bail, the attorney neglected to charge him in execution, whereby he was discharged; this action was held to lie. But in such cases it is not necessary that the damages should be to the full amount of the whole debt; but the court may take into consideration the circumstances of the case, and if it be in the power of the plaintiff to recover and collect the whole, or any part of the debt, of the original debtor, it shall go in mitigation of damages.

But the remedy for injuries by this action, is not confined to the case of attorney and client—for if in the conduct of a suit against any person, an attorney is guilty of any dishonest or unwarrantable practices, he is subject to this action at the suit of the party grieved.

By the practice of our courts, no attorney is allowed to appear in a case, without proper authority; if questioned, his declaration that he is employed is deemed sufficient evidence. But if an attorney should appear in a cause without authority from the party, this action would lie against him.

3. Actions will lie against justices of the peace for any breach, or neglect of the duty of their office—But here we must remark, that the power of justices of the peace is judicial, and ministerial. When they are acting in their judicial capacity, no action can lie against them, for any error in judgment in a question that comes legally before them; for it is an established maxim, that no action can lie against a judge, for rendering an erroneous judgment. But when justices are acting in their ministerial capacity, they are liable for a breach, or neglect of duty. As if a justice of the peace denies, refuses, or obstructs bail, where it ought to be granted, action lies. So if a justice should refuse to sign a writ, by which the party loses his debt, or to take a deposition, by which the party sustains an injury, without doubt this action would lie.

\* Action was brought against a justice of the peace, for a misfeasance in his office, for not calling an action. He pleaded that the person who appeared for the plaintiff, had no power of attorney, and that the writ was served on only one of the defendants, who

who was committed, and was then in goal, and that he did not think it his duty to call the action. An issue in fact was joined as to the power, and a demurrer to the rest—both issues were found for the plaintiff by the county court, but judgment was reversed by the superior court, for the justice under such circumstances could not be liable for not calling the action, for it could be only an error in judgment.

*c* It may with propriety be here remarked, that in the case of all officers, whose duty is ministerial, and is pointed out by law, that if they are guilty of a breach, or neglect of their duty, or if they exceed their jurisdiction, action will lie against them in favour of the person injured—While such ministerial officers, act within their jurisdiction, no action can lie against them for a mistake in opinion, respecting a matter that was regularly in their province to form an opinion upon; but if they under colour of their office, go beyond their power, then every such person shall be responsible for such act to the party injured—and a pretence that he was acting in virtue of his office, will be no excuse.

4. Actions will lie against private persons, that have been guilty of a breach of trust. This subject has been fully considered in treating of bailment, excepting as far as it relates to inn-keepers, which will be discussed in this place.

*b* The person chargeable as an inn-keeper, must be the keeper of a common inn, for such only are chargeable with the loss of the goods of the guest whom they entertain.

*c* It must appear that the person robbed in the inn, was a traveller and guest, for if a neighbour comes to an inn-keeper and desires a lodging, such persons is not a guest to recover against the inn-keeper. So he must be received a guest by the inn-keeper, to make him chargeable. *d* For if a traveller comes to an inn, and the inn-keeper tells him, his house is full, and the traveller replies, that he will shift or take his chance in the inn, which the inn-keeper suffers him to do, and the traveller is robbed, the inn-keeper is not liable. But if the traveller had not used these words, and the inn-keeper notwithstanding his first objection, had admitted him, he had been chargeable; for in the first case the traveller takes

*a* 3 Wilson, 461. *a* Wilson, 382. *b* 8 Co 31. Cro. Jac. 324. *c* Hob. 245. *d* Moor, 78,

waives all the risk of loss upon himself, and the inn-keeper refuses to take charge; but in the latter case, the admission is an implied waiver of the first denial, and so restores the right of charging him.

*c* The loss to the guest must be occasioned by the act of the inn-keeper, or some of his servants, or through their neglect—Therefore if the guest is robbed by his own servant, or companion, the inn-keeper is not liable; because it was the fault of the guest to have such persons with him. But if the inn-keeper appoints another person to sleep in the room with his guest, and he is robbed, the inn-keeper is liable.

*b* The inn-keeper is only answerable for such goods of his guest as are within his house, and so are under his care. *c* But while the goods are in the inn, if the inn-keeper directs the guest to place them in a particular place, under a lock and key, or he will not be answerable for them, and the guest neglects, or refuses to do so, but puts them in another place, and they are lost, the inn-keeper in that case is not chargeable.

*d* The inn-keeper is chargeable on the ground of the profit he receives from his guest, or goods; therefore where there is no profit to him there shall be no charge. If a guest comes to an inn, and departs leaving his goods there, and tells the inn-keeper that he will return in a few days, and during his absence the goods are lost, the inn-keeper shall not be charged—for he has no profit or gain from the keeping such dead goods, and therefore shall not be chargeable for their loss. *e* But this must not be a temporary absence; for if the guest goes out in the morning about business, and returns before night, this is not such an absence as will excuse the inn-keeper. *f* This is confined to the care of dead goods—for if the guest leaves his horse there for any time, tho he is not there himself, the inn-keeper shall be charged in case of a loss, for the standing of the horse is a profit to the inn-keeper, and in respect of that he is chargeable. *g* Sickness, or non-sane memory will be no excuse to an inn-keeper in this action, for he is bound at his peril to take care of the goods of his guests.

The responsibility of the inn-keeper extends to all the goods of his

*a* 8 Co. 22. *b* Idem. *c* Moor, 153. *d* Cro Jac. 188. *e* Cro. Jac. 189. *f* Salk. 388. *g* Cro. Eliz. 622.

his guest, his deeds and writings; and all things in action; but not to any loss, or injury done to his person, as an assault, battery, or the like.

If a servant is robbed of his master's property, the master may maintain this action against the inn-keeper, at whose inn the goods were lost.

Action lies against an inn-keeper for refusing to entertain a traveller, and to provide for his horse, he tendering a proper price for the same.

5. We are to consider Deceits, or as they are commonly called Frauds. Frauds may be committed by the seller, either in the value, or in the title to things sold. Warranties likewise may be made by the seller to the buyer, either in respect of the quality, value, or title to the thing sold. The subject of warranties, and deceits are usually considered together, and conformably to the general practice. I shall follow that method—I shall first consider warranties, and then frauds.

1. A warranty may be considered as a contract on the part of the seller with the purchaser, whereby he engages and assures something respecting the value, or the title of the thing. In England it is become a common practice to ground the action upon the contract, or promise; that the defendant promised the plaintiff, that the horse, or whatever it may be, was sound, or the like; and then to lay a breach of the promise; but in this state the practice has been to ground the action on the warranty.

Warranties may be either express or implied—and express warranties may be general or particular. Express warranty, is where the seller contracts, covenants, or warrants to the buyer that the thing sold is of some certain value—or is sound, free of any defect, good, or that he is the owner according to the nature of the property, and the circumstances of the transaction.

• If a servant sells any thing in the way of his master's business, and warrants it; if there is any fraud, or deceit, the master is liable. As where a gold-smith's apprentice sold an ingot of gold,

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upon a special warranty, that it was of the same value with an essay then shewn, and upon evidence, it appeared, that he had forged the essay, and made the ingot out of a lodger's plate that he had stolen, the master was held to be liable. And even tho the seller himself has been deceived by his servant, yet is he liable to the buyer. *a* For where a merchant sold silk to another, which afterwards appeared not to be of the kind the purchaser meant to buy, whereby he was imposed upon in the value, he recovered against the seller, tho it appeared that there was no actual deceit in the seller, but that it was in his factor beyond sea, for he should be answerable for the deceit of his factor civilly, tho not criminally; and since some body must suffer, it is more reasonable, that he who trusted the factor should be a loser, than the other.

*b* But to charge the seller by reason of his warranty, it must be observed, that the warranty does not extend to defects visible to the eye of the buyer, for of these he must be apprised at the time of the sale, but if the defect is not visible, there a general warranty shall extend to it, and subject the seller in case of a fraud. *c* As a warranty on the sale of cloth, that it is of such a length, and it turns out to be otherwise, this action lies against the seller, because such a defect is not visible to the eye, but is to be discovered only by measuring. *d* So where the warranty was on the sale of an horse, which was warranted sound by the seller, and it appeared afterwards that he was blind, this action was held to lie. For tho blindness is a defect in general visible to the eye, yet in horses it requires skill to discern it.

*e* The warranty must be made at the time of the sale, and not afterwards, in order to charge the vender; for if made after sale, it is made without consideration, neither does the buyer then take the goods on the credit of the seller.

*f* So the warranty must be in the present tense, that the thing is found, not that it will be found.

*g* An offer of warranty at one time shall not extend to a subsequent sale of the same thing. For where the defendant came to the plaintiff who was a sword-cutler, and offered to sell him a second hand sword, and warranting the hilt to be silver, the plaintiff

*a* 1 Saik. 289. *b* 2 Esp. Dig. 415. *c* Finch's Law, 139. *d* Saik. 24.  
*e* Finch's Law, 139. *f* 3 Black. Com. 159. *g* 1 Strange, 414.

iff offered him a guinea and a half for it, which he refused; but having offered his sword to many sword-cutlers, and some bidding him so much as a guinea and a half, he returned to the plaintiff, who would then give him but twenty-eight shillings, which the defendant took. It appeared afterwards that the gripe only was silver and the rest brass. Upon which the plaintiff brought his action upon the first warranty, but it was adjudged that it did not extend to the subsequent sale.

\* If the vender knowing the goods to be unsound, uses any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this action lies, for this artifice shall be deemed equivalent to an express warranty, and the action may be brought on the warranty, and proof of such artifice shall be sufficient to support it.

In all cases of the sale of goods, for a full and adequate price according to their value, where there is no express warranty, the law implies a warranty on the part of the seller, to the buyer, that the things sold are his own—that they are good, sound, and free of any defect, as the case may be. For where a man receives an adequate consideration for his property, there is the same reason and justice that he should warrant it, as if he made an express warranty for the same consideration. Implied warranties, will extend to all defects existing at the time of the sale, which are not visible, whether they are known to the seller or not. For it is reasonable that every person should suffer the loss that happens to any goods while he is the owner, and that he should not have an opportunity to shift his misfortunes on to his neighbours. The proof of actual science of the existence of the defect might be extremely difficult. It is therefore better to make the existence of the defect the gift of the action, which is capable of proof, without difficulty, and is the fairest criterion to fix the liability of the seller.

All implied warranties may be avoided by the parties, when at the time of the sale it is expressly stipulated, that the purchaser shall take the property at his own risk, and that the seller shall not be holden upon the warranty.

So if it appear, that the price of the thing sold was such that

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the parties must have contemplated the defect at the time of the sale, the law will imply no warranty.

2. Deceits, or Frauds, next claim our consideration, and as this is subject of frequent discussion before courts of law, it deserves minute illustration.

All trade, dealing and speculation is founded on the principle, that every person has a right to take advantage of his superior knowledge, discernment, judgment and industry in making bargains in all cases where the parties have equal means of information. If one man can better ascertain and estimate the value of property than another, and by that mean can make a better bargain, universal practice will justify the transaction. If one person knows that any kind of goods bears a higher price in one place than in another, he has a right, without disclosing his knowledge, to purchase in the cheapest, and sell in the dearest place. This is the foundation of all speculation. How far it is justifiable in a moral view for a person to take advantage of the ignorance, or want of judgment of his neighbour, is a question that belongs to a treatise on ethics. But in this place it is sufficient to observe that this is the great basis of commercial transactions, and warranted by law. But then it must be observed that no person in making a bargain has a right to conceal or suppress those material facts and circumstances which he has the means of knowing, but which the other party has not. Neither may a person be guilty of any disguise, deceit, falsehood or misrepresentation, for the purpose of obtaining the advantage of another in a bargain.

Where a thing is of a certain value, and that known to the seller, but cannot be known to the buyer, for any deceit in the affirming the value to be different from what it is, this action lies. As where the landlord of an house, wishing to dispose of his interest in it, affirmed the rent to be more than it really was, whereby the purchaser was induced to give more than it was worth, this action was held to lie; for the value of the rent was a matter of private knowledge between the landlord and tenant. This respects only things of a certain and determinate value: but where the things sold are of an uncertain value, dependent on opinion, whim, or

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fancy,



fancy, there no action will lie against a person for declaring that they are worth more than the common estimation ; for this is mere opinion, without any misrepresentation of facts, which the other party has equal means to know and judge upon. As if a man should declare that his horse was worth fifty pounds, and another should give it, when in fact he was not worth more than twenty, no action lies ; for it can never be safe to admit the principle that a person may be subjected in damages for a fraud, because he has sold property for more than it was worth in common estimation, or in the opinion of jury. Yet, if a man takes advantage of the ignorance, or confidence of another in that manner, his conduct cannot be justified by moral principles.

\* Action will not lie for a fraud in the sale of public securities, because of a public nature, and their value a matter of public notoriety, equally within the knowledge of buyer and seller ; but in the sale of private orders drawn by individuals, or by select-men, where the value actually lies in the knowledge of the seller, and not of the buyer, action will lie for any fraud, falsehood, or misrepresentation, whereby the plaintiff has been injured.

It is said to be a rule of common law, that if the buyer has an opportunity to inform himself of the true value of the thing, and neglected it, the action will not lie. As if in the case before mentioned of the landlord, if he had only said that another person would give so much for it, when in fact he had never offered any thing, this action would not lie, because the buyer might have enquired, and been informed the truth. But the principle that no action will lie for a false affirmation, where the party has the means of discovering the truth, seems of late to have been exploded, and the doctrine respecting frauds, is established upon a broader and more equitable basis.

The general rule is, that where the seller is guilty of a false affirmation or misrepresentation of any fact, relative to the thing sold, which is material to induce the buyer to purchase, and by which he is defrauded, action lies, tho it was in the power of the purchaser by enquiry to have discovered the truth. For it is a moral duty incumbent on every person, to speak the truth. If any person violates the truth, he is guilty of an immoral act, and ought to be answerable

swerable for every injury that another may sustain by it. For the purpose of conducting the intercourse among mankind, it is necessary and reasonable that they should repose confidence in the assertions and declarations of each other ; and that in such cases, they should be obliged to make search and enquiry respecting their truth, which must be a great obstruction to the negotiation of business. It is also compatible with prudence and caution, as well natural for a person to believe the declarations of those who are in common repute. If a person will take advantage of this general confidence that is reposed in the assertions of mankind, for the purpose of defrauding another by falsehood and misrepresentation, reason and justice condemn him for the crime, and the law compels him to make a reparation in damages for the injury.

In all actions for a deceit, it is necessary to alledge and prove a science in the feller ; for this is necessary to constitute a fraud, tho not a warranty. *a* As where the plaintiff declared that the defendant being a goldsmith, and having skill in precious stones, had a stone which he affirmed to be a bezoar stone, which he sold to him for two hundred pounds, when in truth it was not a bezoar stone. After verdict for the plaintiff, judgment was arrested, because the declaration had not charged either that the defendant sold it knowing it not to be a bezoar stone, or that he had warranted it for such a stone.

This action will lie for a fraud in the seller, respecting the representation of his title to the thing sold. *b* In all cases where a person sells property as his own, knowing it to belong to another person, this action will lie against him ; but to support the fraud, it is necessary to alledge and prove a science in the feller. *c* So where a person affirming that certain goods are the property of his friend, that he has authority to sell them, and in fact does sell, having no authority ; for this fraud, action lies. In this case, the deceit being in the false affirmation, it will be sufficient to prove them the goods of another person, without proving the defendant knew them to be so ; for it need not be averred in the declaration, and this proof would be sufficient to put the defendant on proof that he had authority to sell them. An affirmation by a  
person

*a* Cro. Jac. 41. *b* Salk. 210. *Ld. Raym.* 593. *c* Bull. N. P. 32.

person that he is the owner of things in possession, amounts to a warranty to the buyer.

*a* The rule of the common law seems to be, that if a person sells a thing which he really believes, and has reasonable ground to believe is his property, as if he obtained it by fair purchase ; that no action will lie against him for selling it, even tho it turns out that he has no property in it—that if he sells a thing out of his possession affirming himself to be the owner, or knowing that he is not the owner, no action lies against him ; for being out of possession, the buyer must take care.—These principles, however, are not founded in justice, and I presume never have been, and never will be admitted as common law in this state ; but that the following principle founded in equity, will be adopted ; that in all cases where a person for a valuable and adequate consideration, sells goods not his own to another, the law implies that he warrants to the buyer, that they are his own, whether he affirms they are his own, or whether or not he knows that they are not his own. And that in all cases an action will lie on this implied warranty ; and that the gist of the action is not whether the seller affirmed the goods to be his, or knew that they were not ; but merely whether the goods were his, or not at the time of the sale. This principle most certainly is founded in reason and common sense. For if a man exercises an act of ownership about property, by offering it to sale, he by implication declares he is the owner, and the buyer has reason to believe he is the owner ; this therefore ought to amount to a warranty in law.

Another ground of this action as founded on deceit, is where an injury is done to any person from an imposition in cheating, or using false pretences. *b* As where money was left in the hands of a third person, to be delivered to the plaintiff, and the defendant pretending to be the plaintiff to such person, obtained the money, this action was held to lie. *c* So for cheating a person by false cards or dice, out of any sum of money, this action will lie. *d* So assuming a false character, and by that means committing a cheat, is actionable ; as if a man pretending to be single, prevails on a woman to marry him, when in fact he is married, this action

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*a* Salk. 210. 218. Cro. Jac. 196. *b* Moor, 583. *c* Cro. Eliz. 90.  
*d* Bull. N. P. 31. 2 Espin. Dig. 419.

will lie—but if a married woman commits a similar fault, it is not actionable, for all acts of married women are void.

I shall mention some decisions under this head, that have taken place in this state. A man of property gave his note to a known bankrupt, who by means of it purchased property and indorsed over the note in payment, and then gave a discharge on the note to the promissor, by which the indorsee was defeated of the payment. For the fraudulent act of giving a note to a bankrupt, and then taking a discharge, their being presumption of a collusion, which was expressly allledged in the declaration, the promissor was subjected in this action to the indorsee.

Where a man of property combines with a bankrupt, and furnishes him with the means of making the figure of a man of property, and to make part payment for what he may purchase, with a view that he may go where he is unknown, and acquire property on credit, or for part payment and credit, so that they both may share in the profits of the trade; any person who shall be taken in and defrauded by such person so fitted out for that purpose, may bring this action against the person who fitted him out, and on the ground of a fraudulent combination, may recover damages for the cheat. This seems to be going great lengths in favour of a person who is cheated by voluntarily trusting a stranger and a bankrupt; but when it is considered that the man of property who combines with the bankrupt is the indirect remote, but ultimate cause of the cheat, by furnishing means, without which it could not have been accomplished, and that this is an immoral act, it must be acknowledged to be right to subject him. For fraud ought to be discouraged in every shape it assumes.

So where the defendant having obtained an illegal and void warrant to take the property of another, procured and persuaded the plaintiff to aid and assist the officer in the execution of it by misrepresentation, by falsely affirming that the warrant, and the whole business was legal, and afterwards an action was brought against the plaintiff by the owner of the property for a trespass, and the warrant being found void, he was adjudged a trespasser, and subjected to pay large damages. Upon this he brought his  
action

action against the defendant, for the false declaration and misrepresentation respecting the legality of the warrant, and the action was sustained.

If a creditor, or his attorney should turn out to an officer on an attachment, or execution, estate that did not belong to the debtor, and the owner should bring his action against the officer and recover; action would lie in favour of the officer against such person, for tendering to him, and directing him to levy on the estate of a person, not named in the attachment or execution.

This action of trespass on the case, will lie against a person for not procuring an insurance.

• For where a merchant gives instructions to his correspondent to effect an insurance on a ship of his; and he neglects to do it, he is liable in this action, under the following circumstances. When the merchant abroad has effects in the hands of his correspondent here, he is bound to ensure, if ordered so to do—for the merchant abroad has a right to appropriate his money in the hands of another, in any manner he pleases. Where there are no effects of the merchant abroad in the hands of the other, but the course of the dealing has been such that it has been usual to send orders for one to insure and the other to comply, in such case if the merchant here neglects to make such assurance, he shall be liable, unless he has given notice to such person to discontinue the dealing. Where a merchant abroad has sent bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which they are to be accepted, which the merchant here must obey, if he accepts them. But if the merchant abroad limits the merchant here to too small a premium, so that no insurance can be procured, he is not liable.

So where the merchant here uses due diligence to procure an insurance, which cannot be done, or makes an insurance which proves ineffectual without his fault, he is not liable; for if he acts faithfully, and is not guilty of any negligence, he shall not be liable.

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#### CHAPTER

## CHAPTER ELEVENTH.

## OF DEBT.

**D**EBT is an action founded on contract, express or implied, in which the certainty of the sum, or duty appears, and in which the plaintiff is to recover the sum in numero, and not in damages.

Debt will lie upon, 1. Simple Contract. 2. Bonds. 3. Leases. 4. Judgment. And 5. Awards.

1. Debt on simple contracts. • Debt lies upon all simple contracts where there is a commutation of property for money. As for the price of goods sold, wherein the price has been ascertained between the parties. So it will on all simple contracts which are determinate, and the sum due is certain, and dependent on no after calculation. But for such cases, this action has grown into disuse—because by the common law, the wager of law is allowed, and because the plaintiff must recover the exact sum declared for, or he cannot have judgment, which being often uncertain, it has given way to the action of assumpsit; in which a person may recover such sum as he proves to be due. But still this action may be brought on simple contracts, tho never practised; it is therefore necessary to observe that it will not lie against an executor, or administrator, • nor upon a promise to pay the debt of another, • nor against the acceptor of a bill of exchange.

2. Of Debt on Bonds. The general principles respecting bonds have already been considered in treating of contracts. It only remains to mention some particular rules respecting actions that are grounded upon them.

• If a man be bound by a bond to pay a sum of money at five several days, the obligee shall not have an action of debt, till all the days are past, for the contract is entire, so that the breach of it is not complete till all the days are past. This is where the entire sum is due on a single bond; for if it be a bond in a penal sum, conditioned for the payment of money at different days, the condition is broken, and the bond becomes absolute upon failure of payment at any of the days, and debt lies before the last day is past.

In  
• 1 Espin. Dig. 181. 4 Co. 94. 69 Co. 87. • Cro. Car. 146. d Salk.  
23. • Co. Lit. 292. b

• In debt on a simple contract, the plaintiff should set forth in his declaration, the promise or consideration, which is the ground of the action, but in declaring on a specialty, it must be on a certain writing obligatory, or deed sealed with his seal, and conclude with a proferat, for the bond or obligation is of itself sufficient.

Bonds are either single or conditional. Conditional bonds contain certain conditions, which if fulfilled; the penal part becomes void.

In actions brought upon bonds containing conditions, the declaration may either set forth the conditions at large, with an assignment of the breach, or it may be founded only on the penal part; in which case, the defendant having prayed oyer the bond, may plead the conditions, with an averment of the performance, and then the plaintiff in his replication, may assign the breach. This general rule of the common law, extends to all cases of bonds of an official nature, excepting in the case of sheriffs, who in actions on official bonds, must state the conditions in the declaration. This is a principle introduced by our courts.

• It is a general rule, that in actions on bonds, the plaintiff should assign but a single breach, for so only can the defendant know where to apply his defence. • But where the transaction on which the breach is founded is entire, though it consists of many parts, a general assignment of a breach will be sufficient.

• Where a single breach is assigned, it should be fully, and particularly stated in what manner the breach accrued. • The breach should be so assigned, that by no presumption it shall be out of the condition of the bond; for so judgment might be given without cause of action. / But the assignment of the breach need not be in the words of the condition, if it appears to be within the meaning or intent of the agreement.

g Where the plaintiff brings debt on bond, for the performance of any thing, if the defendant pleads matter of excuse, the plaintiff need not set out a particular breach, for the excuse admits the non-performance, and justifies it. As in debt upon a bottomry bond, the condition was, if the ship returned in ten weeks, and gave an

• 1 Espin. Dig. 227.    b 2 Burr. 773.    c Idem.    d Douglass, 203.  
• 1 Strange, 227.    f Dougl. 267.    g Salk. 138.

account of the profits of her voyage, the obligation was to be void. The defendant pleaded, that the ship was lost, and the plaintiff replied that the ship was not lost, to which the defendant demurred, because no breach was assigned; but it was adjudged that the defendant had made it unnecessary, by pleading matter of excuse; but in case of an award, if the defendant pleads matter of excuse for non-performance, the plaintiff must set out the award and breach, for the award may be void in whole or in part, and therefore the award must be set forth, not only that the court may see that there was an award, but also that the non-performance was of a good, and not of a void part of the award, for that need not be performed.

Where a bond is in the disjunctive, a breach of either part by the act of the obligor, forfeits the bond, and is a sufficient assignment of the breach; for the law will supply these words *which shall first happen*. As where the defendant's wife when sole, gave a bond to the plaintiff, which was in the penalty of twelve hundred pounds, if she married any other person than the plaintiff, or refused to marry him within one month after the death of her father. Having married the defendant in the life time of her father, the plaintiff brought debt on the bond, assigning her marriage as the breach: and it was held good, tho' insisted that she might perform one part of the condition, by marrying the plaintiff after her father's death, as he might survive her husband.

a By the common law of England, it is a general rule that the subscribing witness to a bond, should in an action on it, be always produced to prove the execution of it, unless some reason is shewn why he cannot be procured; and then collateral evidence is admissible. This may be considered as law here, b for it has been determined that where the subscribing witness to a note is living, or may be had, he must be produced, if the note is denied, and other evidence of an inferior nature, is not admissible without it.

If the bond be conditioned for the payment of money, the defendant under the plea of full payment, may produce oral testimony, to establish the fact, contrary to a maxim of the English

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a Douglass, 205. b Law vs. Atwater, Sup. Ct. 1794.



common law, that the debt must be destroyed by evidence of as high a nature as the debt itself.

In England there is no relief at law, against the payment of the whole penalty, upon a breach of the conditional part of the bond, which rendered it necessary to apply in chancery for relief against the penal part, upon the payment of the sum actually due. But in this state, by force of a statute for that purpose, courts are vested with the equitable power to cancel the bond to the sum which is justly due, according to the conditions.

Recognizances, are bonds acknowledged before some court, conditioned to abide final judgment, or to prosecute appeals, or for other purposes, as the case may be, and are considered as matters of record. On these, actions of debt as well as scire facias, will lie.

3. Of debt on leases, or for rent. *a* Rents reserved on leases for years, are at all times when due recoverable by action of debt. *b* So where one is tenant at will, with a rent reserved, the lessor may always have action of debt, for rents in arrear. But this action does not lie for rent against tenants at sufferance; *c* nor will it lie for arrears of a freehold rent, during the continuance of the lease.

*d* If there is lessee for years, and he assigns all his interest to another, yet the lessor may still have action of debt against him for rent in arrear, after assignment; first, because the lessee shall not prevent by his own act such remedy as the lessor has against him, on his own contract; secondly, that the lessee might grant his term to a poor man, who not being able to manure the land, and so for need, or malice, it would lie untilld, and the lessor be without remedy by action of debt. *e* But the lessor may accept the assignee for his tenant, and so discharge the original lessee. And if he once accepts rent from the assignee, he can never resort back to the first lessee. *f* But the assignee is bound to pay the rent no longer than while in possession, and he may at any time assign over his term, and so discharge himself, even if it be to an insolvent person; for the action between the lessor and the assignee, is founded on the privity of estate, which is gone by the assignment

*a* Litt. sect. 58. *b* Idem. sect. 72. *c* Co. Litt. 162. *d* 3 Coke, 22.  
*e* Cro. Jac. 334. *f* 2 Strange, 1221. Salk. 81.

ment. *a* But if lessee for years, dies, his executor, or administrator may assign the term, and shall not be chargeable for rent after the assignment; for as they could sell the term to pay debts, so they can assign it, and be discharged from all subsequent demands of rent. If lessee for years, assigns over his term, and dies, the executor shall not be charged for rent, due after his death, for by the death, both the privity of the estate and of the contract, are at an end.

4. Of Debt on Judgment. *b* It is a rule of the common law of England, that whenever a person has recovered a judgment, an action of debt will at any time lie on that judgment, while it is subsisting. That the plaintiff may at any time within a year and a day after the rendering of the judgment, pray out an execution; but that after the expiration of that time, he must by the common law have recourse to his action of debt, and by the statute of Westminster the second, he may bring *scire-facias*, and obtain execution, which is now the common practice.

But in this state, our courts have deviated from the common law of England, and have adopted this rule—that execution may be prayed out on a judgment at any time during the life of all the parties; and to avoid vexation and multiplicity of suits, they have determined, that no action will lie on a judgment during the life of the parties, and when execution can be prayed out, and satisfaction obtained. But if the judgment creditor can obtain an advantage by a new action on the judgment, which he cannot have by taking out the execution, then action will lie; as where a judgment debtor absconds, leaving estate in the hands of an agent, or trustee, but no estate on which the execution can be levied; then an action of debt on the judgment will lie, to enable the plaintiff to recover his due out of the effects of the absconding debtor, in the hands of his agent or trustee, by foreign attachment: but it must be averred in the declaration, that an execution has been issued upon the judgment declared on, and a *non est inventus* returned, or that no goods, or personal estate of the debtor could be found, on which the execution might be levied, and satisfaction of the debt obtained.

*a* Cro. Eliz. 715.

*b* 1 Espin. Dig. 213.

*c* Kirkby's Rep. 311.

If any of the parties are dead, then debt or *scire facias* will lie on the judgment, to enable the parties to carry it into effect by obtaining execution.

Action of debt will lie on judgments rendered by any of the courts of the United States, or any of the States in the Union.

If the judgment be rendered where both the parties are within the jurisdiction of the court, it is conclusive evidence of the debt, and cannot be impeached.

Full credence ought to be given to the judgments of the courts in any of the United States, where both the parties are within the jurisdiction of such court, at the time of commencing the suit, and are duly served with the process, and had or might have had a fair trial of the cause: all which, with the original cause of action ought to appear by the plaintiff's declaration, in an action of debt on such judgment. But where it appears, that the defendant was out of the jurisdiction of such court, when the suit was commenced, and had no legal notice of the suit, no action ought to be admitted on such judgment. As where a person in the Commonwealth of Massachusetts, commenced an action against an inhabitant of the State of Connecticut, and service was made on the defendant by attaching in Massachusetts by the sheriff there, an handkerchief, pretended to be the property of the defendant, and then sending by the hands of two persons a summons, which was left at the house of the defendant, which was averred to be according to the laws of Massachusetts; but the court determined that the defendant being out of the jurisdiction of the courts of the Commonwealth of Massachusetts, at the time of commencing the suit, no legal service could be made of a process issuing from such court upon him while in this state, and therefore refused to sustain the action,

If judgment be obtained in another state, and the debtor has there property sufficient to satisfy the same, and which may be taken on execution, the creditor is bound to seek satisfaction for his debt there; and action will not lie on the judgment. It is not necessary that there should be a return of *non est inven-*

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ous of the execution, to prove that estate cannot be had to satisfy the debt ; but if it appear on evidence that no estate could have been obtained, on which to levy the execution, or if the right to the property be disputable, or the sufficiency doubtful, the officer is not bound to run any hazard ; the judgment creditor, has a right to pursue him into any other state, and obtain satisfaction for his debt in a mode which will not expose him to any inconvenience, by rendering his body liable to be taken in execution and imprisoned till he will discharge the debt.

But where an action of debt on judgment rendered in another state, was brought, and the defendant pleaded that on the original suit he was attached, and procured bail to abide final judgment—and that such bail was liable and able to respond such judgment, and therefore the plaintiff had no right of action ; the court determined that the plaintiff was not bound to pursue the bail, but might proceed against the principal by action of debt.

• Action of debt, or *indubitus assumpsit*, will lie on a foreign judgment—in which case the judgment is *prima facie* evidence of the debt, a sufficient ground for the action, and the plaintiff is not bound to shew any other consideration. Such judgments however are examinable, but it belongs to the defendant to impeach the justice thereof, or shew the same to have been unduly or irregularly obtained. But *assumpsit* will not lie upon a judgment rendered by any of the courts of this, or any of the United States—debt only will lie in such cases.

5. Of Debt on Awards. In all cases of awards, debt may be sustained upon them, tho the party may have a bond, or other written agreement to abide the award ; in which case, he may bring action on the agreement, or debt on the award. Where there is no agreement to abide the award, and there is a naked submission, yet when the award is published, the law implies from the submission an agreement to abide, and debt will lie on the award.

The action must set out the award and aver a fulfilment on the part of the plaintiff, of every thing necessary to be done on his part.

• Douglass. s.

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\* It is a general rule, that lease will lie in all cases where there is a covenant with the

\* The old doctrine, that in lease, the plaintiff can recover only the precise sum he has for his expenses—and later decisions warranted the recovery of a less sum than that sum.

### CASES IN TORT.

#### OF COVENANTS.

\* COVENANTS from action brought for the recovery of damages for a breach of any agreement, entered into by deed between the parties under hand and seal.

Covenants are either in deed, or in law. Covenants in deed are such as are expressly mentioned and recited in the agreement between the parties. Covenants in law are such as the law raises, or implies, tho' not expressed. As in lease demises to lessee, for a certain term, the law always implies a covenant on the lessor's part, that the lessee shall quietly enjoy during the term.

Covenants may again be considered with reference to the object, as real or personal; that is annexed to the land, or merely to the person.

To illustrate this subject fully, I shall consider, 1. The creation of Covenants. 2. The construction of Covenants. 3. The breach of Covenants. 4. Covenants as they respect Assignee, Heir, and Executor. 5. The declaration and defence in actions of Covenant.

1. Of the creation of Covenants. \* There is no need of the word covenant, nor of any particular form of words to constitute a covenant in deed—for any thing under the hand and seal of the parties, importing an agreement, shall support this action as amounting to a covenant.

As in the case of a lease for lands, in which are the words yielding and paying so much rent. This is a covenant, and this

action

\* Vail vs. Mumford, Sup. C. 1789. Cowp. 128. 6 Douglass, 6. 2 Black. Rep. 1228. \* 1 Etpin. Dig. 311. \* 1 Roll. Abr. 518, 519.

action lies for the non-payment, for it is an agreement for the payment of rent, which amounts to a covenant.

• So where in a lease of mills, were these words, "and the lessee shall repair the mills," these were held to make a covenant. So in indentures of apprenticeship, where there are no formal words, but only an agreement that the master should do this, and the apprentice that; yet it is a covenant on both sides.

• But where the word covenant is wanting, the words must import an agreement, or the action will not lie. As if lessee for years, covenants to repair—provided always, and it is agreed that the lessor shall find timber; this makes a covenant on the part of the lessor, and is a qualification of the covenant of the lessee. But if the words had been only "that lessee would repair, provided always, that the lessor should find timber, (without the words it is agreed,) this would create no covenant on the part of the lessor, but would be a condition precedent the performance of the lessee's covenant to repair.

• Covenants in law, differ in this respect from covenants in deed—that the thing to be performed in the case of covenants in deed, is founded on the words, which express what is to be done, as yielding and paying, imply covenants to pay rent. But covenants in law do not follow the words, but are the implications of law, raised from the express covenant, and required to be performed as necessary to the enjoyment of the express covenant. As in the case of leases for years, by the words, *I have demised and granted*. These words import, a covenant in law on the part of the lessor, that he has a good title, and therefore if the lessee is evicted, he may maintain an action of covenant—for by reason of the defect of the lessor's title, he could not enjoy the demise which had been made to him.

• A recital of an agreement in the beginning of a deed, shall create a covenant, on which this action will lie.

• Where a covenant refers to a preceding instrument, upon which it is founded, that instrument shall determine the covenant, that is, the covenant shall extend as far as the instrument and no further.

Where

a Cro. Jac. 397. A Reil. Abr. 519. 4 Co. 80. Cath. 98. 4 Cro. Eliz. 214. 2 Vent. 149.

*a* Where a covenant is founded on the conveyance of an estate, if the estate intended to be conveyed is void, the covenant is void also. *b* But it is otherwise where the covenant is independent of the estate, as to pay money.

2. Of the construction of Covenants. *c* The distinction between the construction of covenants, implied by operation of law, and express covenants is, that express covenants are taken more strictly; and a man may without consideration enter into an express covenant by hand and seal, to the performance of which, he is at all events bound. As in this case, where a master of a ship, by charter party covenanted to be at Carolina by a certain time; tho it appeared that it was impossible that he could be there at the time, from storms and other causes; yet he was held to be liable on the covenant.

*d* For where the covenant is express, there must be an absolute performance, nor shall it be discharged by any collateral matter whatever. As where in covenant for a year's rent from Michaelmas 1725, to 1726, the defendant shewed upon oyer of the lease, that the lessee by covenant was bound to repair in all cases except fire, and then pleaded that before Michaelmas 1725, the premises had been burned down, and not rebuilt by the plaintiff, during the whole year, so that the defendant had no enjoyment for the whole time claimed. But on demurrer, the plaintiff had judgment; for the covenant to pay rent was absolute, and if the defendant had any injury, he should have his remedy, but could not set it off against the demand for rent.

But to these rules, there are some exceptions—If a man covenants to do a thing which then is lawful, and a statute comes which declares it unlawful, or hinders him from doing it, the covenant is annulled by the statute. If a man covenants not to do a thing which it was then lawful for him to do, and a statute comes which compels him to do it, the statute repeals the covenant. But if a man covenants not to do a thing which then was unlawful and an act comes and makes it lawful, yet shall the covenant remain unrepealed.

#### Covenants

*a* Sir T. Raym. 27. *b* Salk. 199. *c* 2 Burr. 1637. *d* 2 Strange, 763.  
*e* Saulk. 178.

*a* Covenants are to be construed so as to have effect, and correspond with the intention of the parties at the time of making them, therefore a performance according to the letter, and not according to the spirit of the covenant, is not a legal performance. As where the condition of a bond was, that the defendant should before a certain day, deliver to the plaintiff a bond wherein the plaintiff was bound to the defendant. If before that day, the defendant sues the bond and recovers, tho at the day he delivers it up, yet it is no performance ; for it could not be the intention of the parties, that it should be put in suit.

*b* But if the covenant is once well performed, tho by a subsequent act it becomes of no effect, yet it is a sufficient performance. As if a man be bound, that his son being an infant under the age of consent, shall marry the daughter of another, before a certain day, and the son before the time marries the daughter ; but when he comes of age disagrees to the marriage, yet is the covenant well and sufficiently performed.

*c* Where there is any doubt as to the construction of a covenant, it is a rule, that it is to be taken in that sense which is most strong against the covenantor, and beneficial to the other party. Therefore where the defendant covenanted with the plaintiff, that if he would marry his daughter, that he would pay him twenty pounds per annum, without saying for how long ; it was held that it should be for the life of the plaintiff, and not for one year only ; for such construction is the most beneficial to the grantee, and against the grantor.

*d* Where covenants are intended for the benefit of covenantees, the covenantor shall not be allowed by any act to defeat the effect of the covenant. As where the defendant covenanted that the plaintiff should have all the grains made in the defendant's brew-house for seven years, and the breach assigned was, that the defendant had put hops into the grains, by which they were spoiled and the cattle would not eat them. The action was held to lie, for the intention of the parties was, that the plaintiff should have the benefit of the grains which by this mean were useless. So if I covenanted to leave all the timber which is growing on the land

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when

*a* Cro. Eliz. 7.*b* 1 Leon. 42.*c* 1 Lev. 102.*d* Jones, 192.



when I take it, and at the end of the term, cut it down but leave it there, it is a breach of the covenant.

*a* No covenant shall be construed to a greater extent than the words import, neither as it respects time or persons, nor so as to vary the duty to be performed.

*b* Express covenants shall qualify the generality and extent of covenants in law.

*c* Where there is a covenant for quiet enjoyment, this shall not extend to a tortious ejection by a stranger; because for this wrong, the lessee may have his remedy against the stranger himself, but if the lessee be ejected by lessor himself, he may have his action of covenant. *d* But if the stranger claims by elder title than the lessor, the lessee may have covenant against the lessor; for he can then have no redress against the stranger, whose title is good in law.

*e* But if the lessor covenants expressly, that the lessee shall enjoy during the term, quietly, peaceably and without interruption, this will extend as covenant against all tortious ejections whatever. *f* And tho the general covenant to save harmless, or for quiet enjoyment, does not extend to the tortious acts of a stranger; yet the lessor may covenant against the acts of a particular person, or persons; in which case, covenant will lie for a tortious ejection by them.

*g* Where the covenant is for quiet enjoyment, against the unlawful let, suit, entry, or eviction of the covenantor himself, or his heirs and assigns; a disturbance by him, if done under a claim of right is a breach of covenant.

This covenant for quiet enjoyment is usually from any acts of the lessor, or any claiming under him. Those who claim under him, are those who come in in privity of the title, as heir, executor, or assignee.

A covenant to save harmless, is similar in its nature to that for quiet enjoyment, and the law as to it is the same; therefore this

covenant  
*a* Saund. 411. Cro. Eliz. 517. Cro. Jac. 182. Dougl. 26. *b* 4 Co. 80.  
*c* Cro. Eliz. 213. *d* Fitz. N. B. 342. *e* Hob. 35. *f* 1 Stran. 400.  
*g* Term. Rep. 671.

covenant is not broken by the tortious act of any one not claiming under the lessor.

Covenants for repairs, are usually to deliver up the premises in as good plight as they were received. *a* If lessee covenants to keep an house in repair, and leave it in as good plight as it was at the time when he received it, in this case, the ordinary and natural decay is no breach of covenant—but the lessee is bound to do his best to keep it in good plight, and therefore ought to keep it covered.

*b* Where there is this covenant on the part of the lessee, if he pulls down houses, or suffers them to decay, no action will lie against him till the end of the term; for before that time he may repair them: but if he cuts down trees or timber, covenant lies immediately, for such cannot be replaced in the same plight at the end of the term.

*c* A general covenant to repair, and to deliver up in repair, shall extend to whatever buildings shall be erected during the term.

*d* If the covenant is that—It is agreed that the lessee shall keep the house demised in good repair, the lessor putting it in good repair, covenant lies against the lessor on these words, if he does not put it into good repair.

*e* There is a difference between covenants in general, and covenants secured by a penalty of forfeiture. In the latter, the obligee has his election to bring an action of debt for the penalty, after the recovery of which he cannot again resort to the covenant, because the penalty is a satisfaction for the whole, or he may waive the penalty, and proceed on the covenant, and recover more, or less than the penalty, toties quoties.

*f* Another distinction is, where the penalty is only in nature of punishment, or in terrorem, and where it makes part of the agreement as a compensation. As if the covenant be not to plough a meadow, and there be a penalty of fifty pounds an acre, there a court of equity will relieve—for there the penalty is as a punishment: but if the covenant had been to pay five pounds for every

acre

*a* Fitz. Abr. Cov. 4. *b* Fitz. N. B. 342. *c* 1 Espin. Dig. 328. *d* Idem, 4 Burr. 2225. *f* Idem, 2228.

acre of meadow ploughed. this is part of the agreement, and there is no alternative: it is the particular liquidated sum agreed upon by the parties, and is the proper quantum of the damages, which the jury ought to find. <sup>a</sup> And therefore where the covenant was by the defendant, not to marry any one except the plaintiff, and if he did, he would pay her a thousand pounds: this sum, it was held should be the settled quantum of the damages to be found by the jury. <sup>b</sup> A difference also is to be observed between assigning a breach on an action of covenant, and in debt on a bond for the performance of covenant—that in covenants it is sufficient to assign the breach in the words of the covenant, because all is recoverable in damages, and these shall be what the plaintiff can prove he has sustained—but in debt on bond, a certain breach must be assigned. <sup>c</sup> Tho' if the substance of the breach so assigned be proved, it is sufficient, tho' not precisely as laid. As bond by lessee, not to cut trees, and breach assigned in cutting twenty trees, proof of cutting ten, will support the action, for the cutting the trees is the substance.

3. Of the Breach of Covenant. Covenants, considered with respect to the time of performance are of three kinds.

1. <sup>d</sup> Such as are mutual and independent, where either party may recover damages of the other, for the injury he may have received from the breach of the covenant in his favour, and where it is no excuse for the defendant to alledge a breach of covenant on the part of the plaintiff.

2. <sup>e</sup> The second species are such as are conditional and dependent, in which the performance of the one, depends upon the prior performance of the other, and therefore till the prior condition is performed, the other party is not liable to an action of covenant.

<sup>f</sup> The principal doubt under this head is, what constitutes a prior condition; and the following resolutions have taken place. The plaintiff declared, that he covenanted to transfer to the defendant, on or before the 21st of September, so much stock, and that the defendant in consideration of the premises, covenanted to accept and pay for it, and the breach assigned was, that he was ready to transfer, and that the defendant then and there refused to

accept

<sup>a</sup> 4 Burr. 2228. <sup>b</sup> 1 Ld. Raym. 107. <sup>c</sup> Co. Litt. 282. <sup>d</sup> 4 Dougl. 665. <sup>e</sup> Idem. <sup>f</sup> 1 Strange, 335.

accept and pay for it. On demurrer, it was objected that the transfer was a condition precedent, and that the plaintiff should therefore shew an actual transfer, before he brought his action. But it was held, that the consideration of the premises, is in consideration of the covenant to transfer, not of the actual transfer; that it was not therefore a condition precedent, but that a tender was sufficient to support the action.

*a* In executory contracts, if the agreement be, that one shall do an act, and for the doing thereof, the other shall pay, there the doing the act, is a condition precedent, and the party who is to pay, shall not be compelled to part with his money, till the thing be performed, for which he is to pay. But there are exceptions; as if the day appointed for payment, is before the time when the thing can be performed, an action may be brought for the money, before the thing be done, for it appears, that the party relied upon his remedy, and intended not to make the performance a condition precedent, but it would be otherwise where the day is subsequent to the performance.

*b* But where a prior performance is necessary, that performance by one party immediately raises a duty on the part of the other, and he is bound to perform his part within convenient time, and without request. *c* The dependence therefore, or independence of covenants is always to be collected from the evident sense and meaning of the parties, and however transposed the words may be, their precedency must depend on the order of time, in which the intent of the parties requires their performance.

3. *d* The third species of covenants, considered with regard to the time of performance, are such as are mutual conditions, and to be performed at the same time. In these, if one party is ready and offers to perform his part; and the other neglects, or refuses to perform his part, he who is ready and offers, has fulfilled his engagements and may maintain this action for the default of the other, tho it is not certain that either is obliged to do the first act.

As where the plaintiff declared on an engagement by the defendant, to pay six hundred pounds on the plaintiff's assigning the equity of redemption in certain premises. It was adjudged that the

*a* Salk. 171. *b* 1 Roll. Abr. 438 *c* Dougl. 665. *Idem.*

the word *on* makes it a covenant to be performed by each party at the same time ; and that therefore, where the plaintiff offered and was ready to perform on his part, and the defendant refused to perform his, that the plaintiff should maintain his action for the non-performance.

*a* Where the plaintiff relies on a tender and refusal, it should appear that he could have performed his part when the tender was made. Therefore, if one party disables himself from performing his part by any act of his own, the other party is not obliged to offer to perform his part, but may have his action immediately.

We are next to consider in what manner a breach of covenant may be committed. *b* If the covenant, is a covenant in deed ; this action will lie only for a misfeasance, but not for a non-feasance. As if a man grants a way, covenant lies for stopping it up, but not for letting it go out of repair ; *c* for covenants in deed must be broken by some act done.

*d* But in the case of a covenant in law, action lies on it tho there be no act done to cause a breach. As where the defendant was lessee by the words—*I have demised*, and he brought his action of covenant against the lessor, because the lessor was not seised, but a stranger, the action was held well to lie on the covenant in law, tho the lessee had never entered, and no actual expulsion had taken place, for it would not be reasonable to force the lessee to enter and become by such entry a trespasser.

*e* The breach of covenant must always refer to that which is the subject matter of the covenant or undertaking. *f* It must always be committed on that which is granted by and passes under the deed containing the covenant. *g* It must be committed during the existence of the estate on which the covenant is placed : for if the estate expires at the time the covenant is broken, this action cannot be maintained. *h* But if the estate continues after the breach committed, the action will lie even after the estate expires.

4. Of Covenants as they respect Assignee, Heir, and Executor.

1. Of covenants against assignees. *i* When the covenant relates

*a* 1 Strange, 504. *b* 1 Saund. 321. *c* Cro. Eliz. 13. *d* Hob. 12. *e* Cro. Eliz. 410. *f* Idem, 557. *g* Idem, 131. *h* Will. 143. *i* Cro. Eliz. 916. *j* 5 Co. 16.

lates to and is to operate on a thing in being, parcel of the demise, the thing to be done by force of the covenant is in a certain manner annexed to the thing demised and shall go with the land, and bind the assignee to the performance tho not named. As if the covenant is to repair an house then demised, this shall bind the assignee, tho not named. But it is otherwise where the covenant relates to a thing not in being at the time of the demise. As if it be to build a wall on the land demised, this not being in esse, when the covenant was made, it shall not extend to the assignee, if not named.

*e* But if the covenant mentions the assignee; as if lessee covenants for him and his assigns, there the assignee shall be bound by any covenant, for any thing to be done on the thing demised, as to build a wall on the lands demised. But to do any thing which is merely collateral to the thing demised, as to build a house on some other part of the lessor's land, there the assignee shall not be bound, tho named.

*f* Wherever a covenant is for the benefit of the estate demised, or extends to its support, it shall bind the assignee, tho not named.

*e* If the assignee be named in the original covenant, yet if it has been broken before assignment, no action will lie against him.

*d* To entitle the lessor to maintain an action of covenant against the lessee as assignee, he must be assignee of the whole term.

*e* If there be a covenant which runs with the land, as to repair; and lessee assigns over, and assignee dies intestate; the lessor may have covenant against the administrator of the assignee, and declare against him as assignee. For such covenants bind them who come in by act of law, as well as of the parties.

*f* With regard to how far the lessee, or assignee are chargeable in covenant, there is a considerable difference. 1. Lessee has from his covenant both a privity of contract and of estate; and tho he assigns and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant, notwithstanding the assignment. *g* But 2dly, the assignee comes in only by privity of estate, and he therefore is liable only while in possession. *h* As

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*a* 5. Co. 16. *b* Cro. Jac. 125. *c* 5 Co. 24. *e* Saulk. 199. *d* 3 Burr. 1271. *e* 5 Co. 17. *b* *f* Dougl. 736. *g* Idem, 441. *h* Cro. Jac. 309.

to the first point, therefore if the lessee assigns, the lessor accepts rent from the assignee, yet for the breach of any express covenant, tho committed after the assignment, this action will lie against the first lessee, on the ground of the privity of the contract—but an action of debt will not.

1. But as to the second point, if lessor brings covenant against an assignee of his lessee, the assignee may plead, that before action brought or cause of action accrued he had assigned over. For the assignee is only chargeable in covenant for a breach committed while in possession, not for a breach after assignment. And it is no objection that the assignee may assign to a beggar—for it was the lessor's folly to accept of the original assignee. But it is to be observed that this distinction applies only in cases of covenant in deed. And in cases of covenants in law, action will lie against the lessee only.

2. Of Covenants in favour of Assignees. 1 Covenants in law which run with the land shall extend to the assignee, who may maintain this action on them. As upon the words demise and grant, the assignee shall have a writ of covenant if ejected; for as the lessee or assignee have the annual profits in return for rent, therefore for a loss of these, he is entitled to a compensation from the lessor.

Assignees who come in by act of law, shall have the benefit of these covenants and maintain this action.

3. Of Heir and Executor. 1 Covenants real, or such as are annexed to the estate shall descend, and the action be brought either by or against the heir, or executor, according to the estate and the time of the breach. As to the estate, the heir shall have the action by reason of the reversion and injury to it. 2 As where lessee for years, covenanted to repair, and leave in repair; it was held that the heir should have an action of covenant on this tho not named: for it was a covenant that run with the estate, and so should go with the reversion to the heir.

3 As to the time of breach, the action is given to the executor, as in this case; the plaintiff as executor, declared that the defend-

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 a Salk. 81. b Douglass, 735. c Cro. Car. 188. d 4 Co. 30. e Co 17.  
 f Fitz. N. B. 343. g 2 Lev. 92. h 2 Lev. 25.

ant had sold to the plaintiff's testator certain lands, and covenanted with him, his heirs and assigns, that he should enjoy against him and another person and all claiming under them ; and the breach assigned was, that a person claiming under one of them, had ejected the testator. It was objected that the action should be brought by the heir or assignee. But it was held that the eviction being in the life of the testator, he could not have heir, or assignee ; and so the action belonged to the testator.

The action of covenant lies against the heir, or executor, also according to their estates.

*a* Executors or administrators who come to any term of lands or tenements, as such are bound by the covenants which run with the estates, as belonging to the personal property of the testator, or intestate. As if the lessor covenants with the lessee, to make him a new lease at the end of the term, and the lessee dies ; his executor may have covenant on this, tho not named.

*c* Where lands come to the executor or administrator, they may be charged with a breach in their own time, as non-payment of rent, or with an action of covenant, either in that right, or as assignees ; but with this difference : *d* that if the plaintiff declares against them as assignees, they are charged as terre tenants, and the judgment is of their own estate, but *e* if as executors, or administrators then of the estate of the testator, even where the breach is committed in their own time as for repairs ; for it is the testator's covenant which binds the executor as representing him, and he therefore must be sued by that name.

*f* But covenants merely personal descend exclusively to the executor, or administrator, and covenant lies only against them.

#### 5. Of the declaration and defence in actions of Covenant.

1. Of the declaration. *g* Where the action is founded on an indenture, the person bringing the action, must be a party to the deed, or he cannot maintain the action.

*b* Where a covenant is for the benefit of any person, he must take notice and advantage of it at his own peril.

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*a* Hob. 188.      *c* 1 Wilson, 4.      *d* Salk. 309.      *e* Salk. 317.  
*f* Hob. 188.      *g* 1 Rol. Abr. 317.      *b* Cowper, 123.



*a* The declaration should set out expressly, that the covenant was made by deed ; *b* but it need not set out the whole deed at length, or superfluous parts.

*c* Where the covenant is general, a general assignment of a breach is sufficient ; *d* and the most general, is in the words of the covenant.

*e* But where a covenant is broken by some act of a third person, it is not sufficient to state the breach generally, for that act should be set out ; but it should seem, that it might be sufficient to state that breach in the replication.

*f* Where the plaintiff assigns a breach, it should be so set out that it may appear clearly to be within the covenant.

*g* Where there is a proviso in a deed defeating the covenant, the plaintiff need not set it out in his declaration, but leave the defendant to plead it. *h* But where this is an exception making part of the covenant, the plaintiff in setting out the breach should also shew that the breach was not within the exception. For the declaration is on the whole covenant, and a breach will not be within it unless so set out.

*i* Where a covenant is in the alternative, that is, where the covenantor undertakes for one of two things, breach should be assigned as to both. *j* But where it is founded on the contingency of two things, and that which shall first happen, the plaintiff may declare upon a breach arising from the happening of one of them, without making mention of the other.

*k* Where the action is for a breach of covenant, by the act of a third person, the declaration should set out that the breach was by such a person, under a claim of title, or by lawful act ; for the covenant on the part of the covenantor, does not extend to the illegal acts of others who are themselves liable to an action.

*m* It is a general rule that where a thing is to be done by a man or his assigns, the breach must be in the disjunctive—that it was not done by him or his assigns—but where the act is to be done to a man or his assigns, it is sufficient to assign the breach, that it

*a* 2 Strange, 814. *b* Cowp. 665. *c* 1 Salk. 139. *d* Cro. Jac. 170.  
*e* 1 Lev. 83. *f* Stil. 1. *g* Sir T. Raym. 65. *h* Sir T. Jones, 125.  
*i* 1 Leon. 250. *k* 1 Ld. Raym. 132. *l* Cro. Eliz. 917. *m* 1 Salk. 139.

was not done to him without mention of his assigns—but this rule applies only in the case where the action is not against the first covenantor or lessee.

*a* If the plaintiff in declaring in covenant, undertakes to state the estate under which he derives his right to the action and misstates it, the declaration will be ill.

*b* Where the plaintiff cannot sue on a breach of covenant without some previous acts to be performed, the declaration should aver the performance of them.

*c* Where there is a joint covenant by several, all should join in the action, or on demurrer on oyer it will be bad.

*2. Of the Defence.* *d* If all the covenants in an indenture, are in the affirmative, the defendant may plead performance generally; but if any are in the negative, he must plead to those specially, for a negative cannot be performed, and to the rest generally. *e* So if any of the covenants are in the disjunctive, he must shew which he has performed.

Where the covenant is for the act of a stranger, performance generally, is a bad plea; it should shew it was performed.

*g* A covenant in an indenture shall not be pleaded in bar to a covenant in another; except such be a defeasance of the former; for perhaps the injuries may not be equal. *h* But one covenant in a deed may be pleaded in bar to another in the same deed, for the sense of the parties is to be collected from the whole deed. As in covenant for rent, the defendant was allowed to plead another covenant in the same indenture, that he might retain so much of the rent for repairs and charges.

*i* The defendant cannot plead, that he had nothing in the tenements—for the indenture is an estoppel.

## CHAPTER

*a* Dougl. 374. *b* 1 Will. 165. Hob. 217. *c* 2 Strange, 1146.  
*d* Co. Litt. 303. *e* Idem. *f* Show. 1 *g* 2 Vent. 217. *h* 1 Lev. 134.  
*i* 3 Lev. 446.

## OF ACCOUNT.

**ACTION** of account is grounded upon an express, or implied contract, that in all cases where one person has been the receiver of the property of another, to use and improve and account for, with the profits thereof, that he will render his account for the same.

In the consideration of this subject, I shall observe, 1. Against whom Account will lie. 2. In what cases Account will lie. 3. Of the Pleas to the action of Account. 4. Of the trial before Auditors.

1. Against whom account will lie. *a* Action of account by the common law, lies only against guardian in socage, bailiff, or receiver, between merchants and the executors of merchants, in favour of trade and commerce : for between them there is such a privity that the law presumes they know each others disbursements, receipts and acquittances.

*b* It is provided by statute, that executors who are also residuary legatees, when all, or any part of their legacies are withheld from them, by their co-executors, may bring their action of account against them for the recovery thereof : and the like action is allowed to residuary legatees against executors.

That joint-tenants, tenants in common and co-partners, their executors, and administrators, may as the case requires maintain action of account against each other, where either has received more than his proportion of the profits of the common estate.

*c* Where there are several partners in trade, action of account will lie in favour of one against the rest, after the partnership has ended—in which the whole of partnership accounts may be adjusted.

2. In what cases Account will lie. *d* It seems to have been a principle of the common law, that an action of account will not lie for a thing certain, as if one man delivers ten pounds to another to merchandize with, he shall not have account of the ten pounds

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*a* Co. Litt. 172. *2* Roll. Abr. 161. *b* Statutes, 12. *c* Debit vs. Stanford, Sup. C. 1794. *d* Bro. Tit. Account, 355. *2* Brown. 76.

But of the profits which are uncertain.—The ground of the action seems to have been a claim for the profits of goods, money, or other estate delivered by one person to another to use and improve. But in this state our courts have disregarded the principles of the English common law, and have extended this remedy to things certain. The rule therefore may be laid down on this broad basis—that account will lie not only in cases where money, or other estate has been received to merchandize with, use, improve and dispose of, and account therefor with the profits—but likewise in all cases where a person has received money or other estate, to the use of another, and especially if received of a third person to deliver over. \* As where in an action of account for two hundred pounds in specie, and two hundred pounds in bills of exchange, received of the plaintiff at New-York by the hand of a third person, to bring to him at Norwich, after verdict, the defendant moved in arrest, because the action was for a sum certain, but the court overruled the exception. Here the money was not delivered to use and account for the profits, but the precise sum was to be delivered over, and for this precise sum, the action was brought and sustained.

b The plaintiff may waive his action of account and bring his action on the promise to account. So in all cases of the reception of a certain sum, assumpsit for money had and received, will lie.

Account will lie where the reception and possession of the property was lawful; if the taking was tortious, this action will not lie.

3. Of the Pleas to action of account. The defendant may plead the general issue, that he never was bailiff and receiver to account.

\* It is a rule of pleading in account, that a matter which may and ought to be pleaded in bar, cannot afterwards be pleaded before the auditors; the reason is, to avoid trouble and charge to the parties.

d Another rule is, that if the party is once chargeable and accountable, he cannot plead in bar, except in the case of a release,

or

\* Kirby's Rep. 164. b Idem, 165. v 3 Will. 113. d Idem, 113. 114.

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That joint-tenants, tenants in common and co-parceners, their executors, and administrators, may as the case requires maintain action of account against each other, where either has received more than his proportion of the profits of the common estate.

*c* Where there are several partners in trade, action of account will lie in favour of one against the rest, after the partnership has ended—in which the whole of partnership accounts may be adjusted.

2. In what cases Account will lie. *d* It seems to have been a principle of the common law, that an action of account will not lie for a thing certain, as if one man delivers ten pounds to another to merchandize with, he shall not have account of the ten pounds

but

*a* Co. Litt. 172. *b* Roll. Abr. 161. *c* Statutes, 12. *d* De Witt vs. Stanford, Sup. C. 1794. *e* Bro. Tit. Account, 355. *f* Brown. 76.

But of the profits which are uncertain—The ground of the action seems to have been a claim for the profits of goods, money, or other estate delivered by one person to another to use and improve. But in this state our courts have disregarded the principles of the English common law, and have extended this remedy to things certain. The rule therefore may be laid down on this broad basis—that account will lie not only in cases where money, or other estate has been received to merchandize with, use, improve and dispose of, and account therefor with the profits—but likewise in all cases where a person has received money or other estate, to the use of another, and especially if received of a third person to deliver over. \* As where in an action of account for two hundred pounds in specie, and two hundred pounds in bills of exchange, received of the plaintiff at New-York by the hand of a third person, to bring to him at Norwich, after verdict, the defendant moved in arrest, because the action was for a sum certain, but the court overruled the exception. Here the money was not delivered to use and account for the profits, but the precise sum was to be delivered over, and for this precise sum, the action was brought and sustained.

b The plaintiff may waive his action of account and bring his action on the promise to account. So in all cases of the reception of a certain sum, assumpsit for money had and received, will lie.

Account will lie where the reception and possession of the property was lawful; if the taking was tortious, this action will not lie.

3. Of the Pleas to action of account. The defendant may plead the general issue, that he never was bailiff and receiver to account.

c It is a rule of pleading in account, that a matter which may and ought to be pleaded in bar, cannot afterwards be pleaded before the auditors; the reason is, to avoid trouble and charge to the parties.

d Another rule is, that if the party is once chargeable and accountable, he cannot plead in bar, except in the case of a release,

or  
\* Kirby's Rep. 164. b Idem, 165. c 3 Will. 113. d Idem, 113. 114.

## 1. Of implied contracts.

Action of implied promise, or assumpsit, is a remedy of a very extensive and beneficial nature, and much encouraged.

*a* It is founded upon equitable principles and will lie in all cases where the defendant is obliged by the ties of natural equity to refund, or pay money, which he may have received of the plaintiff, or for his use.

*b* This action will lie in all cases where one employs another to transact any business, or perform any work—and the law presumes that the employer will pay the person employed, as much as he reasonably deserves; and if he neglects to make payment, he may bring his action on the implied promise, and aver that the defendant promised to pay him as much as he reasonably deserved, and that his labour was worth such a particular sum, which the defendant has neglected to pay—but the estimation of his labour will be submitted to a jury, who will assess such damages as they think the plaintiff merited.

*c* This action will also lie where one takes up goods, or wares of a tradesman, without expressly agreeing for a price. There the law concludes that both parties did intentionally agree that the real value of the goods should be paid, and an action of assumpsit may be brought accordingly, if the vendee refuses to pay the value of the goods.

*d* This action will lie where a person has laid out and expended his own money, for the use of another at his request, for the law implies a promise of repayment.

*e* It will also lie upon a stated account between two persons, for the law implies that he against whom the balance appears has engaged to pay it to the other; tho there be not any actual promise. Actions of assumpsit are therefore brought declaring that the plaintiff and defendant had settled their accounts together, and that the defendant engaged to pay the plaintiff the balance, and has neglected to do it.

This

*a* By *J. Mansfield*, 2 Burr. 1072. *b* This is called an assumpsit upon a quantum meruit, 3 Black. Com. 162. *c* This is called an assumpsit upon a quantum valebat, 3 Black. Com. 163. *d* *Idem*. *e* *Idem*, 164. This is called *indivisum computatist*.

*a* This action will lie for the value of the use and improvement of lands upon a lease parole, where there has been an actual perception of the profits; and the statute of frauds and perjuries is no bar to such action.

*b* This action will lie to recover money paid under a mistake, or through the deceit of the other party.

As if an underwriter pay money on an insurance of a ship, supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid.

It lies for the recovery of money paid on a consideration which happens to fail.

*c* As where the plaintiff paid money to the defendant upon his promise to make him a lease of land, and before the lease was made the defendant was evicted, the plaintiff recovered his money by this action, the consideration not having been performed.

It lies to recover money paid to one acting under, or in pursuance of a void authority.

*d* As where one having letters of administration, appointed the defendant his attorney to receive money owing to the intestate, who received the same and paid it over to administrator, afterwards a will appearing and the administration being repealed, action in favour of the executor against the attorney was held to lie, because he acted under a void authority.

*e* It lies to recover money obtained from any one, by extortion, imposition, oppression, or taking an undue advantage of the party's situation.

*f* As where the plaintiff having pawned plate to the defendant, for twenty pounds, at the end of three years came to redeem it, and tendered four pounds more than the legal interest for that time; the defendant refused to take less than ten pounds, the plaintiff paid the ten pounds, and had his goods, and brought his action for the surplus of the legal interest so extorted from him. It was objected that the plaintiff might have tendered legal interest, and

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*a* Rogers vs. Tracy, Sup. C. 1790.

*b* 2 Burr. 1010.

brought  
*c* Palm. 364.

*d* 1 Salk. 27.

*e* 2 Burr. 1012.

*f* 2 Strange. 915.



brought trover for the goods, and that the payment was voluntary and so not injurious. But the action was held to be maintainable, because the plaintiff might be in immediate want of his goods, and trover would not be a competent remedy—and because the defendant took an advantage of his situation, which deprived him of that freedom in the exercise of his will, which every person ought to possess, when the rule that *a voluntary act cannot be an injury*, ought to apply.

c So where the plaintiff's brother was a bankrupt, and she was induced by an agent for the defendant, a principal creditor to give him forty pounds to sign the bankrupt certificate, the money paid for that purpose was allowed to be recovered back in this action, as oppressively and unjustly extorted from the plaintiff.

d This action will lie to recover money which has been embezzled, or which any person has been defrauded of, by cheating, or otherwise. As where the nurse to a person, when he died took money and went off, the administrator was allowed to bring his action for money received to his use. In such cases, the owner shall recover the property when embezzled, if he can identify it, tho not in the hands of the person embezzling it. As where the plaintiff's clerk embezzled notes and money, and paid them to the defendant in the insurance of tickets which was contrary to law, it was held that as these notes were not paid bona fide; but for an illegal consideration, and their identity could be traced, that the real owner should recover them.

e If money has been recovered in consequence of any judgment, or adjudication, if it should be reversed as erroneous, the money may be recovered back again by this action.

f It is a clear principle that the merits of a judgment, can never be overhauled by an original suit either in law or equity, till the judgment is set aside or reversed, it is conclusive as to the subject matter of it. But money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money may be manifest upon grounds which could not be used by way of defence against the judgment. Therefore, whenever a person has recovered

money

a Dougl. 672.

b Bull. N. P. 130.

c Idem, 135.

d 2 Burr. 1009.

money of another by a judgment that was lawful, yet if there be certain circumstances which prove the retaining of such money to be iniquitous and unjust—but which could not have been used by way of defence against the judgment, this action will lie—but the merits of the judgment cannot be called in question.

As where the plaintiff indorsed to the defendant four notes of hand, made to him the plaintiff; for the purpose of enabling the defendant to recover the money of the promissor, upon the written assurance that such indorsement should be no prejudice to him, notwithstanding which the defendant summoned him into a court of conscience upon these notes, as indorser, where he offered such an agreement against the action, which the court rejected, and rendered judgment on the mere foot of the indorsement, it was held that this action would lie for the money thus recovered, upon the principle that the judgment was right, because the court had not cognizance of such collateral matter—but that the defendant in consequence of his agreement, had no right in justice and good conscience to retain the money, and ought to refund it—that the plaintiff might if he pleased, waive his right of action upon the written agreement, by which he could be indemnified for all cost and damage, and have recourse to this action for the money thus recovered against an express agreement, and retained contrary to justice.

So if the indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser who knew nothing of the payment—or if a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home, or upon the life of a man presumed to be dead, who afterwards appears, or upon the representation of a risque deemed to be fair, which comes out afterwards to be grossly fraudulent—this action will lie for the money, in which the right of the original judgment will not be questioned, but a collateral matter only which constitutes the justice of the claim, and shews the money in equity ought to be refunded.

These are cases of implied contracts, in which the defendant having obtained possession of the plaintiff's money, is compellable to restore it by this action. A similar obligation arises where the law has given a claim against any one.

If a person becomes the member of any society, or company, he thereby agrees to abide by all legal claims arising against him, from the bye laws, or local regulations of that society to which he belongs. Where the law has given to any person certain fees, or reward for his employment, or trouble, they are recoverable in this action.

Where a surety becomes bound for the debt and duty of another at his request, the law implies a promise that he will indemnify and save him harmless, and on failure, this action will lie,—a but it has been adjudged by the superior court, that upon a promise of general indemnity, a mere liability to be sued is not a breach so as to maintain this action.

¶ In an action on a note dated Feb. 25, 1739, and payable the first day of November following, a condition indorsed thereon was, that if the defendant saved the plaintiff harmless from a recommendation of Brace, to Cornish, the note was to be void—It appeared from the pleadings, that Brace obtained credit by the recommendation—that he had been sued by Cornish—the execution returned non-est, and that he was insolvent—but that the plaintiff had not been sued on the recommendation by Cornish, and had not paid any thing. The superior court were of opinion that the action was not sustainable, but their judgment was reversed by the supreme court of errors.

This finishes the subject of implied contracts—and we now proceed to consider,

2. Express Contracts. In a former part of our enquiries, we have had occasion to treat largely on contracts—but little remains to be remarked under this head.

1. Of Wagers—Assumpsit will lie to recover a wager fairly won, and arising on a contingency, the event of which is unknown to both parties; but it must not be for a blind to an illegal or an immoral transaction, or to conceal simony, usury, or bribery, nor must it be inconsistent with the sound policy of the state to support it. Such is the common law of England; I know of no decisions of our courts that have admitted, or denied the principle. I think good policy will induce them to reject the doctrine—as no govern-

ment  
 a Britnal vs. Helms Sup. C. 1791.      b Fillis vs. Brace, Sup. C. 1793.

ment ought ever to encourage the acquisition of property by mere hazard.

2. Of Bills of Exchange, and promissory notes. This subject has been fully considered in every point excepting with regard to assignments. In this state we have no statute making bills of exchange and notes negotiable. Their assignment is dependant on the principles of the common law. As the same general rules will apply to each, I shall treat only of the assignment of notes. I shall consider, 1. How far notes may be deemed assignable 2. The nature of Indorsements. 3. The liability of the Indorser to the indorsee.

1. How far notes may be deemed assignable. *a* It is a general principle of the common law, that a thing in action is not assignable, *c* but tho a bond (and we consider notes on the same basis,) cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it.

*b* In equity bonds, and by a parity of principle notes, or any other thing in action, are assignable for a valuable consideration paid, and the assignee alone becomes entitled to the money, so that if the obligor, or debtor after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again—but a payment to the obligee will be good, where there is no notice of the assignment. *d* An assignee must take the bond, or other security subject to the same equity, that it was in the hands of the obligee.

2. The nature of Indorsements.—The object of indorsements is to enable the indorsee to collect the note, by vesting him with a power of attorney for that purpose, and to warrant against a failure. Indorsements may either be in writing, or filled up, or they may be blank.

An indorsement in writing completed at the time the indorser subscribes his name on the note, is a special contract governable by the terms of it like any other contract. These indorsements usually contain a power to sue and collect the note with a warranty

of

*a* Co. Lit. 214. Roll. Abr. 376. *b* Co. Lit. 232. 1 Bac. Abr. 157.  
*c* 2 Vern. 595. *d* 2 Vern. 423.

of the ability of the promissor to pay—but where there is a special contract between the parties respecting the nature of the assignment, or the warranty, it is usual to specify it. If it be a bare assignment without the risk of the indorser—then the indorsement should contain only a power to sue and collect and convert to the use of the indorsee, expressly excluding a warranty. For an indorsement for value received, with the power of collection, and conversion to the use of the indorsee, will by implication of law raise a warranty.

But where a complete assignment of the note with warranty is intended, it is the usual practice to make the indorsement in blank. The operation of a blank indorsement is, that the indorsee has a legal right to fill it up, or write over the name of the indorser, the strongest contract against him which the nature of the case will admit. It is a contract that the indorser will permit, and authorize the indorsee to commence an action on the note, in the name of the indorser and pursue it to final judgment without any interruption, or molestation—that he may receive the money due and apply it to his own use, clear of any accountability—and that the indorser warrants that the promissor in the note, is of sufficient ability to pay the same. Every thing is to be intended on such an indorsement, that is consistent with the nature of an assignment, that is most favourable to the assignee.

The indorsement may be filled up whenever the indorsee pleases, and it has been permitted to be done even in court. But a blank indorsement by implication of law will support an action. The indorser not only gives this power to the person to whom he actually transfers and delivers the note; but any other person into whose possession the note comes in the course of business, lawfully may in like manner fill up the indorsement to himself.

\* A blank indorsement does not operate as an assignment of any note, but the one on which it is written, tho there may be several notes on the same piece of paper.

† The indorser in an action brought against him on the warranty arising from a blank indorsement, will not be admitted to produce parol proof, that at the time of the indorsement, there was a special contract,

• Wadham, vs. Vanderwerker, Sup. C. 1792.    † Kipb. Rep. 393.

contract, that he should not warrant, and that the indorsee should take the note at his own risque—because parol proof cannot controul a written contract. Neither would he be admitted to adduce a written contract for the same purpose, except between the original parties, for where the note thus indorsed is delivered, or assigned to another person who brings the action, the indorser cannot avail himself of his written agreement not to warrant, which was made with a different person, but if the action be brought by the first indorsee, with whom the contract was made, then such written agreement may be considered as a discharge of the contract of warranty, and may be pleaded in bar to the action. If however in either of these cases, the first indorsee recovers against the indorser upon the warranty, where there was a parol contract not to warrant, or if he transfers the note to a third person, who recovers on the warranty, where there was a written contract not to warrant, an action will lie on such contracts, in favour of the indorser, against the indorsee, for the recovery of damages sustained by such a violation of contract. Such is the common law, and such is the law of reason and common sense. <sup>a</sup> But the courts have determined, that parol evidence may be admitted to explain the meaning of a blank indorsement—for until it is filled up by the indorsee, it has no certain import, <sup>b</sup> and that a blank indorsement is no evidence of property or warranty.

Notes frequently circulate in the course of business upon the credit of the first indorser—but sometimes when the indorsee transfers a note that has been assigned to him, he indorses the same and becomes an indorser to the person to whom he transfers the note, together with the first indorser—and if ever so many persons indorse a note, they are all indorsers to the last indorsee. Tho they can give no power to commence an action on the note—yet they warrant that the first indorser being the original promisee in the note, shall permit a suit to be brought on the note in his name, and be pursued to final judgment without hindrance—and in every other respect the subsequent indorsers warrant the note in the same manner as the first indorser.

<sup>c</sup> It is a general rule that the indorsee must in the first instance have

<sup>a</sup> Smith vs. Barber. Sup. C. 1790. <sup>b</sup> Bignlet vs. Dane, Sup. C. 1792.  
<sup>c</sup> 1 Strange, 649.

have recourse to the promisor, or maker of the note—and on his default only, can make demand of the indorser—where there are several indorsors, the last indorsee on the default of the maker of the note, has a challenge upon all of them, and may sue all or any, and pursue his remedy till he has obtained actual payment or satisfaction.

A payment made by the debtor in the note, to any of the indorsees holding it in his hands as last assignee, will be good, tho not actually indorsed on the note, because such indorsee acted as an attorney for the payee, and had right to receive the money—but an indorser prior to the payment shall not be liable to a subsequent indorsee—for no indorser, shall warrant only with respect to the state of the note at the time of the indorsement, and not with respect to any subsequent payment. Therefore if the payee of a note indorse it, and the indorsee receive payment, and then indorses it, the last indorsee can only call on the second indorser, the first not being liable.

If the payee of a note, should assign, or deliver it over to another without any indorsement, but for a valuable consideration, the law will presume an engagement on the part of the payee, to authorise the purchaser, to sue and collect the note—and also a warranty of the ability of the maker of it. So a verbal warranty in such case would be good.

3. Of the liability of the Indorser to the Indorsee. If the indorser in any way impedes, or prevents the indorsee from collecting the note, or receives payment, or discharges it, he becomes liable to the indorsee upon the indorsement. If the maker of the note at the time of the indorsement be a bankrupt and wholly unable to pay it, then an action on the warranty will immediately lie in favour of the indorsee against the indorser, without a suit to recover it of the maker—but in such case, the plaintiff must prove the inability of the debtor in the note, to pay at the time of the indorsement, or he cannot recover—It is therefore the best mode and the general practice, to bring an action on the note against the maker of it, which in case of inability, settles the point with legal certainty—for if the execution be returned non-est, or the debtor be

be committed on it, and take the poor prisoners oath, the indorsee has pursued as far as the law will warrant, and he may call on the indorfor.

It is a general rule, that if the indorsee makes use of due diligence to obtain satisfaction of the note, and fails by reason of the inability of the promissor, then the indorfor is liable on his warranty to pay the same, with all necessary cost. But if the indorsee be guilty of any neglect, and does not use due diligence, by reason of which he fails to obtain payment of the note, the indorfor is discharged, and the indorsee takes the loss upon himself.

Thus if the indorsee fails to put the note in suit at the first court after the assignment, or if he neglects to take out execution in due season after judgment, and the promissor absconds, or becomes a bankrupt, by which the debt is lost, he can have no action against the indorfor. <sup>a</sup> So if the indorsee give further time of payment, or receive part of the money on the note, it is taking upon himself to give the whole credit to the drawer, or maker of the note, and absolutely discharges the indorfor,—and so of subsequent indorfors.

By our practice, a demand of payment by the indorsee from the promissor, and a neglect or refusal, will not be sufficient to warrant him to bring his action against the indorfor—but he is bound to recover the note of the promissor by suit, where he is able to pay—of course, the delay of calling upon the promissor for the payment of the note, will not affect the indorsee if he does not delay a suit till after the next court following the assignment.

In all cases, to enable the indorsee to maintain action upon his warranty against the indorfor, it is necessary to give notice to him of the default of the drawer of the note to pay, and to aver it in his declaration, and prove it on the trial.

2. I proceed next to consider what contracts will not maintain this action. <sup>b</sup> This action being founded on an express, or implied undertaking; when ever the presumption of such undertaking is excluded, this action will not lie—as where it appears

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that

<sup>a</sup> 1 Burr. 353. <sup>2</sup> Strange, 745. <sup>b</sup> 1 Esp. Dig. 86.



that the money for which the action is brought, is paid without the consent of the person sued.

*a* A mere voluntary courtesy, which has been undertaken without the prospect of certain recompence, will not support this action—As where a person transacted business for another in expectation of legacy—but being disappointed, he was not allowed to maintain an action for his services, because he had no respect to any compensation but a legacy. *b* But if there be any request made by the defendant, there the courtesy, or benefit shall not be deemed voluntary, but in pursuance of the request, and therefore a good ground of action.

But tho a request has been made, yet if it was the consequence of the offer, advice, or inducement of the other party, no action lies. *d* Where any thing is done in the course of a person's proper business, or employment, it shall not be deemed a voluntary courtesy, but the foundation of a contract. *e* Where a person has been ignorantly induced by the false representations of another, to do an illegal act, from which a damage arises to him, he shall recover these damages from the person who induced him to act in that manner, on his subsequent promise to indemnify him—the no action will lie, where the consideration is an illegal act.

*f* This action will not lie to recover money promised for doing that which it was the parties duty to do without reward, for it is extortion, and illegal. *g* So this action being an equitable one, cannot be supported, when the assumpsit arises from an unconscientious demand.

*b* Tho the person who has received money from another, is not entitled to keep it, yet if it depends on a question of right, which cannot be completely tried in this action, but can in another, assumpsit cannot be maintained for it. As where this action was brought to recover money given as the difference in the exchange of two horses, where it afterwards appeared, that one of them was unsound. The action was held not to lie, for the warranty was the point to be tried, which could not be in this action.

#### Indebitatus

*a* 2 Strang. 728. *b* Hob. 10, 105. *c* 1 Esp. Dig. 88, *d* Idem. *e* Hutt. 55. *f* 2 Burr. 924. *g* Cowp. 793. *h* Cowp. 414.

*a* *Indebitatus assumpsit*, or implied promise, being an action for money had and received, will lie for money only, and not for any collateral article—As where this action was brought for money had and received, and on trial, it appeared that bank-stock was received, it was adjudged that this did not support the action.

*b* *Assumpsit* will not lie for money paid on a note, secured by a mortgage, previously to a fore-closure, tho the lands are averred to be of more value than the mortgage money at the time of the fore-closure—for all equitable considerations are noticed by the court, before they decree a fore-closure—and they cannot be the ground of a subsequent action.

*c* A general *indebitatus assumpsit*, will not lie for mistakes in a settlement of an account, but the action ought to be special.

*d* A special *indebitatus assumpsit* will not lie for a mistake in a settlement by arbitration upon a general submission of all matters of controversy—for it would open a door to endless litigation, to permit the parties in such cases to go into a proof of what articles were exhibited to and allowed by the arbitrators. *e* In a general *indebitatus assumpsit*, proof that the defendant agreed on a sale of land, if it fell short of a certain quantity, to return the consideration money in a certain proportion, will not support the action—for in such cases the plaintiff ought to declare specially, so as not to surprise the defendant, and that a bar may appear of record, against any future action for the same cause.

### 3. Of Contracts, with respect to Factors, Agents and Partners.

*i* As to factors. *f* If a factor sells the goods of a person beyond sea, he may maintain an action in his own name for the price; for the promise shall be presumed to be made to him: And so if he buys goods, the seller may have an action against him, for the credit shall be presumed to be given to him: and particularly, because it is for the benefit of trade. *g* This is clearly the case, where there is no interposition of the owner of the goods sold: as to him, the law is, that the factor's sale creates a contract between the buyer and the owner of the goods: and therefore, if the factor sells for payment at a future day, if the owner gives notice to

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*a* 3 Burr. 2592. *b* Fitch vs. Coit, Sup. C. 1791. *c* State, vs. Lawrence, 1792. *d* Park, vs. Halfey, 1794. *e* Snow, vs. Chapman, 1794. *f* Buller N. P. 13. *g* 2 Strange, 1182.

jury to set out for what the debt became due, and not generally, that the defendant became indebted and undertook to pay.

\* In actions upon parol promises, the day of the promise laid in the declaration is not material: † but where the day makes a part of the contract, and so is of substance, it must be precisely set forth, and the alleging of a different day in the replication, would be a departure. As is the case in an action upon a note, where the day is material and of substance. But in an action upon a parol promise, it is not necessary to prove the promise to be made at the time laid in the declaration. ‡ As where the promise was laid in December 1792, and proved to be made in December 1793, the difference in point of time was held to be immaterial.

#### CHAPTER FIFTEENTH.

#### OF THE ACTION OF BOOK DEBT.

**T**HIS action is known only in this state, and is singular in two respects—as to the form, and as to the admission of the parties to testify as witnesses. Tho not brought for the recovery of a thing certain, yet it has assumed the shape of an action of debt. The form is, in a plea that to the plaintiff, the defendant render such a sum, which he owes by book, and has never paid, tho often requested, without setting forth any promise. Tho this action lies only in cases where assumpsit will, yet contrary to the principles adopted in that action, the parties are allowed to be witnesses.

Our judicial history is so scanty, that it is impossible to trace the origin of this action—but it is probably co-eval with our government. The first mention of the admission of parties to be witnesses, is in a statute passed in the year 1714, from which the present is copied. It is there enacted—that in all such actions, (referring to actions of book debt,) wherein the sum in debate, shall be such as shall be tried by a jury, the jury shall well weigh and consider the credit of the parties, admitted by the court to take the oaths in or out of the court, in such cases and such forms as testimonies in other cases in this government are by law allowed, together with any other evidence given them, and all the other circumstances

a 1 Strange, 21.

b Idem, 22.

c Gordon, vs. Payne, &c. Supp. Court, 1794.

circumstances thereof, and upon their oaths, shall give their verdict thereon, for what they shall find justly due upon the evidence.

From the expressions made use of in this statute, it seems probable that courts had previously admitted the parties to be witnesses, without the express authority of a statute—that questions frequently arising, respecting the credit which ought to be given to the oath of the parties, a statute was made not to authorise the court to admit them as witnesses, but to sanction the practice, and to ascertain what regard should be paid to their testimony.

It is probable, that the idea was derived from the practice of the courts of chancery in England, and our ancestors with that spirit of innovation and improvement, which is so manifest in their early laws, might have supposed that if it was rational, that the parties should be admitted to testify in a court of chancery, where the disclosure of facts within their own knowledge rendered it necessary, that the same reason would authorise their admission to testify before courts of law—Perhaps the necessity of adopting this principle was more urgent here, because at that time the general assembly was the only court of chancery, and it must have been an intolerable hardship to have been obliged to apply to that tribunal in all cases of book debt, where the oaths of the parties were necessary to a disclosure of facts within their knowledge. This action has therefore superceeded the necessity of applications to courts of chancery, in all matters of account—and may be considered as a suit in equity, so far as respects the mode of proof.

As to the nature of this action, it may be remarked that assumpsit will lie in all cases where book debt will—but that book debt will not lie, in all cases where assumpsit will. It is difficult by any precise principles to ascertain the bounds and extent of this action. It may generally be said, that it will lie only for such articles sold and delivered—for the use of such personal things, as are let and hired—and for such services done by one person for another, as are usually in the ordinary intercourse of mankind charged on book, and wherein the law implies a promise, that the purchaser of the goods will pay to the seller, as much as they are

are reasonably worth, and that the performer of any service, shall receive as much as he reasonably deserves. The merchant and the farmer charge on book, the articles they sell on credit, the lawyer, physician, mechanic and labourer, in like manner charge their services. So if a man lets his horse, or any other article of property, he charges the use on book—and in such cases, there is no question but this action lies.

A tort, or any consequence of it, cannot be the subject of this action—nor can a contract as such—but where one person contracts with another, to do certain service at a certain price, the service (tho not the contract) may be charged on book, and on proof of the contract, a recovery may be had of the sum agreed to be paid. *a* Where the plaintiff charged on book, thirty shillings paid to one person for the use of another, for which he alledged, that he had the defendant's promise, to pay an equal sum in sheep, it was adjudged that this action would not lie.

*b* It has been adjudged, that interest on a book, may be recovered in this action, where there is an express, or implied promise to pay it. That the established custom of merchants to exact interest after a year's credit, being known to the defendant at the time of obtaining the credit, the law will presume an undertaking to allow it; that where there is an express promise for the payment of interest, it must be proved by other evidence than the party.

*c* This action will lie for betterment done on lands, at the request of the owner—but will not lie for the use and rent of lands. *d* It will not lie for a mistake in a former settlement on book.

Where no price has been agreed on by the parties, the plaintiff shall recover for his articles, or services charged, what is reasonable and just, according to the going price at the time of the sale and the performance of the service.—In which case, any fraud, or deception in the goods charged, may be taken into consideration, in the estimate of their value. Where there is an express agreement for a particular price, the plaintiff will be allowed to recover that sum—but ought to prove the agreement, by other testimony

*a* Kirb. Rep. 289. *b* Idem, 209. *c* Idem, 138. *d* Idem, 150.

truly than his own.—It has been held, that where goods have been sold and delivered, at a certain price agreed on by the parties; that in this action, for such goods, the defendant may not set up for his defence a fraud, or deception in such goods—but shall be liable to pay the price agreed, and must have recourse to his action for the fraud, because such questions ought not to be tried in this action. It has been decided, that an order, too expressed for value received, is a proper charge on book, because an article frequently passing among mankind in their commercial intercourse, and customary to be charged on book.

♣ In an action on book against an executor, the account exhibited was forty-five pounds, paid to the deceased on a note, for which a receipt was given and lost. The whole money had been recovered in an action on the note. And the question was, whether this was such a book debt as the plaintiff might be admitted to prove by his own oath. The superior court adjudged that the plaintiff might be admitted to testify, which judgment on a writ of error was afterwards affirmed in the supreme court of errors.

This decision is clearly against the first principles, on which the action of book debt is grounded. The necessity of the case introduced the practice of admitting the parties to testify—but their oath only is not to be considered as all the evidence in the case.—The books which are kept by the parties, are a material and essential part of the proof, and much depends upon their being kept fairly and regularly, with proper entries, made from time to time, according as the articles were delivered, and the services performed.—There can be no question, but that money is a proper charge on book—when delivered in the ordinary course of dealings—but in this case, the money was not delivered, to be charged on book, and was not originally so charged; but the plaintiff failing to apply it on his note charged it on book, and brought this action merely for the purpose of coming in himself to testify, because he had not other proof, when it was clear, that the claim was a proper subject for *indebitatus assumpsit*. It cannot be warrantable to admit the party, to change the form of his action for the purpose of becoming a witness, when by the general

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♣ *Storrs, vs. Storrs*, Sup. C. 1789.  
 of *M'Donald*, Sup. C. 1789.

♣ *Hard, vs. Fleming*: Executor

ral principles of law he ought not to be a witness. The principle on which this decision is grounded, will permit action of book to be brought in all cases of *indebitatus assumpsit*. If it be proper in such cases, it certainly is equally so in all other cases—and if the doctrine be carried to its proper extent, the consequence would be, that we ought to reject the maxim which has been adopted in the jurisprudence of all nations, that parties are not to be witnesses in their own cases—and expressly declare that parties may always be witnesses in their own cases.—For who can discover any distinction between the propriety of admitting the party to testify, that he made payment on a note, for which action is brought, and that he has lost his receipt: and admitting him to testify in an action on book brought for the money that he paid it on the note, and has lost his receipt? Who can discover any distinction between the propriety of admitting parties to be witnesses in actions of implied, or express promises? The real ground of this action is justifiable, because it admits a mode of proof necessary and the best the nature of the case will admit of—but to extend it in this manner, is to break down the barrier against perjury, which courts have established, and to go over the head of first principles of the greatest importance in our jurisprudence. It would have been much better, that the plaintiff in this action should have lost his debt, in consequence of losing his receipt, than that the court should adopt so dangerous a principle to afford him relief. For where is the security for our written contracts, if they may be indirectly proved, to be paid in this manner—especially, when the original creditor being dead, cannot contradict, or counteract the testimony of the debtor. A greater encouragement to fraud and perjury was never given by the decision of a court, and if it is held to be law by courts, the legislature ought to interfere.

There has been some doubt as well as difference of opinion with respect to the points, about which the parties may testify—It has been held, that their testimony ought only to be admitted with regard to the quantity, quality and delivery of the articles charged, the letting, or using of articles hired, and the actual performance of service, with the time employed—and where there is any special price, or mode of payment agreed on, it should be proved by other testimony.

testimony.—This would seem to be as far as the nature of the action required—but the practice has been to admit the parties to testify their whole knowledge respecting the article charged, as to delivery and payment in the same manner as any other witnesses, and from the whole testimony, to form their opinion as to the truth of facts.

Where any matter is pleaded in bar, or any question arises on a collateral fact, the parties cannot be allowed to testify. As the parties are admitted witnesses, so by a parity of reasoning, interested persons are.

The court cannot compel the production of books and papers, but where either party refuses upon the challenge of the other, every thing shall be presumed against the party refusing.

\* As book accounts may some times contain a great number and variety of articles, which it would be extremely inconvenient for a court and jury to examine and adjust, in order to facilitate the trial, it is provided by statute, that in all actions brought on book accounts, if the account be alledged to be above five pounds, the court may appoint auditors to adjust the same, and award the balance, for which judgment shall be rendered with additional costs.

For the purpose of lessening suits and terminating controversies, it is provided by statute, that in every action of book debt, where it shall appear on trial, that the plaintiff is in arrear to the defendant, to balance book accounts, that judgment shall be rendered in favour of the defendant, to recover the balance of the plaintiff with his cost; and that in this action, if the defendant neglects to exhibit his account on trial to be adjusted, and shall afterwards bring his action to recover the same, if he recover judgment, he shall not be allowed any cost, unless he can make it appear, that he had no knowledge of the former trial, or was inevitably hindered from appearing and exhibiting his account. † Tho an action of book debt is pending, the defendant may bring his action on book, against the plaintiff—for the prior suit will not abate the latter, tho it may affect the cost.

\* Statutes, 12.

† Ratcliff vs. Dewitt, Sup. C. 1790.



When the defendant exhibits his account before a justice of the peace, and the balance exceeds four pounds the justice cannot give judgment for the balance.

*a* Action of book debt, will not lie to recover for mistakes in a settlement of book accounts, or articles omitted in the settlement; but the party must resort to a different action, and point out the mistakes.

The admission of the parties to testify in the action of book debt, can be justified only from the necessity of the case, and tho attended with many inconveniences, is unquestionably the best mode to settle book accounts that can be adopted. To admit the books of the parties without proof to evidence them, would produce the greatest injustice; to require proof of every article, would require an impossibility; to allow the proof of part of the articles charged, to support the delivery of the whole, would open the door to the greatest fraud. It is best therefore to let the parties in to testify, but to check and guard them by requiring regular entries of all the articles in the ordinary course of dealings—and where their entries on book, are not such as to confirm and support their testimony, to disregard it; for the book is to be considered as matter of evidence, and must derive its credit, from its fairness and regularity, and from having been made at the time of transaction,

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#### CHAPTER SEVENTEENTH.

##### OF SCIRE FACIAS, AND FOREIGN ATTACHMENT.

**T**HE writ of Scire Facias, may issue upon judgments, and recognizances, and bail bonds. *b* When founded on a judgment, it is deemed a judicial writ, and is intended to carry such judgment into effect.—In all such cases, the writ must issue from the court where the record is, on which the action is brought, and must be signed by the clerk. It however so far partakes of the nature of an original writ, that the defendant may plead payment, a release, or any other proper matter, happening subsequent to the rendering of

*a* Rogers, vs. Moore, Sup. C. 1793. *b* Co. Lit. 290. Fitz. N. B. 267.

of the judgment : \* but he may not plead any thing, which might have been pleaded on the original action.

This writ lies where either of the parties are dead, to revive the judgment in favour of their executors, or administrators, by which execution may be obtained. If there are several plaintiffs, or defendants, and one die, this writ lies to revive the judgment in favour of the survivors. Where judgment has been obtained, and execution issued against the estate of any deceased person, in the hands of his executor, or administrator, and is returned unsatisfied; this writ lies to affirm the judgment against the person and estate of the executor.

† Where damages have been assessed, and cost taxed for laying out a highway, in a town; if the town neglect to pay, a *scire facias* may issue against the selectmen, to shew reason why execution should not go against them.

Where judgment has been rendered on a bond having several conditions, which may be broken at several times, when judgment has been rendered upon one, and another breach takes place, a *scire facias* may issue against the party.

On all bonds of recognizance, taken before any court to prosecute an action, or an appeal, or to abide any sentence, order, or judgment of a court, and on all bail bonds, taken for the appearance of a party, *scire facias* may be granted, when the conditions are broken, and a forfeiture accrued. But this important distinction is to be observed: In all cases of recognizances to prosecute actions, or appeals, the surety, or recognizer is absolutely bound to pay the cost in case of a failure in the action, and the rendering of judgment against the person, for whom he is recognized. It is not therefore necessary that execution be taken out, and returned non est, for if the principal goes to goal, and takes the poor prisoner's oath, it will not discharge his bail, or surety. The *scire facias* may therefore issue immediately after the judgment, in case of a failure to pay the cost recovered. But where a person recognizes for the appeal of an action, on the part of the defendant, he is responsible only for the cost subsequent to the appeal, and does not release any preceeding bail.

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\* Green, vs. Dewit, 1790.

† Statutes. 96.

But in case of a bail-bond taken by the officer, for the appearance of the defendant, where the process is by attachment, or a bond of recognizance acknowledged in court, that the defendant shall abide final judgment, the surety or bail are liable only in case of the principal's avoidance, and a return of *non est inventus* of the execution.

This provision of law, is calculated to furnish debtors with the means of keeping out of prison, when they can find bail to be responsible, that they shall be forth coming, to be taken on the execution. The principal is considered as being in the custody of the bail : and as the creditor has no claim only for the body of the debtor on the bail, if he can be had, to be taken in execution, the bail shall be exonerated. The surety may before, or at the time of rendering final judgment, bring the principal into court, and move to be discharged ; upon which, the court shall order the keeper of the goal to receive him into custody, that he may be taken upon execution. \* If the principal be surrendered up in court, an entry thereof must be made by the clerk of the court, for nothing else can be evidence of the fact, and parol proof could not be admitted. If there be no surrendry, then it is the duty of the creditor to take out his execution, and use all due diligence to take the body of the debtor ; and if he be taken, then the surety is exonerated : but if the principal avoids, and cannot be taken on the execution by the use of due diligence, then the surety is liable.

The return of *non est inventus* on the execution must be fairly obtained, or the surety is not liable ; for where the creditor by some artifice procures the execution to be returned *non est inventus*, merely with a view to subject the bail, when the principal might have been taken, by using proper diligence, he shall not be allowed to maintain this action. As where the creditor kept the execution till within a few days of its expiration, and then gave it to an officer, who went once to the house when the debtor happened not to be at home, and then immediately returned it *non est inventus* : the creditor then brought his action against the bail, but it appearing on proof that the debtor was at home publicly, both before and after the officer was at his house, and that he then

happened

happened to be absent on business, without any intent to avoid the execution, verdict was for the defendant, and unanimously accepted by the court.

The writ of scire facias, or other process on a bond, must be taken out and served on the sureties within twelve months after the rendering final judgment; or the right of action is barred. Of course execution must be taken out, so that a non est inventus can be returned within that time; but it may be taken out at any time within a year, which will admit of a non est return, and the use of due diligence to take the debtor: and need not be taken out immediately upon the rendering of the judgment.

\* But a bond given for the prosecution of any action, or appeal, need not be put in suit within a year, but may be sued at any time because not within the statute.

† It has been determined where the principal shut himself up in an inner room, and by threats prevented the officer from breaking the door, and levying upon his body; that this is such an avoidance, that the bail is liable, tho the officer had a right to break open the door, and levy on the debtor: because it was by the debtor's resistance, that the officer was prevented from taking him, and it is as much the duty of the bail to render the body, as of the officer to take it. But if the principal be arrested by virtue of the execution, and afterwards, by force rescues himself, and escapes, or is rescued by others, the officer cannot excuse himself—for he might have taken sufficient assistance, and the bail is exonerated. ‡ If the officer returns the execution against the principal, before the return day, yet no advantage can be taken of it upon a suit on a bail bond, unless the bail can show that he was prejudiced by it. § The appearance of the principal to discharge the bail, must be by surrender in court, or pleading to the action; and it is not sufficient, that there has been a continuance of the cause, for this might be on motion of the bail, to bring in the principal, or on motion of the principal to procure special bail.

An erroneous judgment has the effect of a final judgment, with

\* *Fitch vs. Burr*, Sup. C. 1791.      † *Kirb. Rep.* 384.      <sup>respect</sup> *Ibid.*  
 ‡ *Ibid.*, 424.

respect to bail. As where the judgment of the superior court was reversed by the supreme court of errors, and the cause returned back, and judgment rendered in favour of the plaintiff, who brought his action against the bail, it was determined that the bail was discharged by the judgment, tho erroneous. So where a new trial is granted, it is deemed a supersedeas of the former judgment, and a new judgment must be given in the case, tho decided precisely as before. In these cases, the bail is considered to be discharged—Thus where the defendant in the scire facias gave special bail for the defendant in the original action, and bond for the appeal, the action was decided in favour of the defendant; a new trial was granted, and judgment rendered for the plaintiff: but the bail was holden not to be liable.

a So where judgment was rendered against the defendant, and he was committed in execution. He obtained a new trial, and having the liberties of the prison, went home—On the new trial, judgment was rendered against him for a less sum, but on writ of error upon the whole proceedings of the county court, judgment was reversed; and a judgment rendered against him, by the superior court. The original action was by attachment, and the defendant procured special bail—He was committed in execution upon the last judgment. Action was brought against the sheriff, for his escape, after the granting of the new trial, but it was held not to lie—for the granting of a new trial was a supersedeas of the former judgment.

b In an action of scire facias, upon a replevin bond; the case was, that the plaintiff attached a horse upon a writ against one Baxter, and the defendant gave bond on a writ of replevin. Judgment was rendered against Baxter, he was committed in execution, and took the poor debtor's oath, and this action was then brought on the bond, and the defendant pleaded these matters in bar: but the court adjudged, that the horse was a pledge for the debt, and the replevin bond came in place of the horse, and that nothing but the satisfaction of the debt, or discharge can exonerate the bail.

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a Fleming, vs. Lord, Sup. C. 1790. b Bucl, vs. Devenport Sup. C. 1798.

A Foreign Attachment, is a remedy calculated to enable a creditor to compel the debtor, to his debtor, to pay over the debt to him, in cases where his immediate debtor lives out of the state, or has absconded in such manner that the creditor cannot compel him by legal process to pay the debt. The law is derived from a practice somewhat similar in the city of London, where a creditor may call upon the debtor, to his debtor, and obtain a payment of his debt. But in this state, the remedy has been made general in all cases where justice required it, and furnishes to a creditor, a new mode of collecting his debts.

This action will lie only in favour of creditors, for the purpose of collecting a debt, and will not lie in cases of torts. The cases in which this action lies are the following—Where there are lands, goods, or effects of absent or absconding debtors, not residing within this state, the creditor may attach them wherever they may be found, and the attaching a part, shall make the whole in any persons hands liable, and he shall expose them to respond the judgment that may be recovered. But where such lands, goods, or effects, cannot be come at so as to be attached, then the creditor may bring his proper action against his absent or absconded debtor, for the recovery of his dues, and in the service of the writ, the officer shall leave an attested copy of it, at least fourteen days before the time of trial, with such absent or absconding debtor's attorney, factor, agent or trustee, or at the place of his or their usual abode; which service shall be a sufficient citation for the creditor to bring his action to trial; unless the debtor be an inhabitant of this state, or has for some time resided therein, in which case, the officer shall leave a like copy at his last usual place of abode.

<sup>b</sup> In a process by foreign attachment, the defendant pleaded in abatement, that he belonged to the state of New-York, and that the person with whom the copy was left in service, was not his agent, factor, trustee, or attorney; on which, issue was joined: the court refused to admit the garnishee to testify in that stage of the cause, and determined the issue to be immaterial, and the plea in abatement insufficient: for the object of the statute, is to

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discover

<sup>a</sup> Statutes, 34.    <sup>b</sup> Bacon, vs. Masters. Sup. C. 1793.

discover debts, and property concealed by debtors, and as the garnishee can testify only in a scire facias against him, to admit this plea where he cannot testify, would defeat the statute.

All debts due to any absent, or absconding debtor, are considered as effects in the hands of the persons, from whom they are due; who are deemed agents, or trustees, and recovery may be had against them in the same manner as for goods, or chattles.

The action being thus commenced, the statute provides, that the attorney, factor, agent or trustee upon his desire, shall be admitted to defend the principal: but if the debtor be not of this state, and no person appear to defend, the action shall be continued to the next court, and if necessary, a second continuance shall be allowed, to give time to notify the principal. The operation of a foreign attachment is, that from the time of the service, all the goods and effects of the debtor in the hands of his attorney, factor, agent or trustee, and debts due to him from any debtor, are liable to respond such judgment as may be recovered, not withstanding any subsequent disposition of them: and in case such attorney, factor, agent, or trustee shall remit, or dispose of any effects, after service of the writ, or shall refuse to expose the same to be taken in execution, he shall be liable to satisfy the same out of his own estate, as his own proper debt.

When judgment is obtained against the principal, the creditor must take out execution, and must not only search for the estate of the principal, but must likewise apply to and make demand of the same of the agent, attorney, factor, trustee, or debtor, as the case may be, on whom service of the writ was made, and who is usually called the garnishee. It is the duty of the garnishee, if he has as any of the effects of the debtor in his hands to expose them to be taken on the execution, or if he be indebted to the principal, he will be authorised to pay the amount of what he owes, on the execution, and such payment will be a bar to an action brought by the principal. But on refusal of the garnishee to expose the effects of the principal, or pay the debt which he owed him, the execution should be returned non est inventus, with respect to the principal, and also that demand was made of the  
garnishee

garnishee, and that he refused to shew the estate, or pay the debt due to the principal.

This lays a foundation for a scire facias, to issue from the clerk of the court, where the judgment was rendered, to be served on the garnishee, requiring him to appear, and shew cause if any he has why judgment should not be rendered against him. The declaration must state the whole of the proceedings, and particularly the demand of payment of the execution made of the garnishee, and his refusal. If the garnishee make default of appearance, or refuse to disclose upon oath, which the court is authorized to administer, what goods or effects of the debtor were in his hands at the service of the original writ, judgment shall be rendered against him, as for his own proper debt. This action may be tried by a jury.

If the garnishee appears and defends, he is allowed by statute to be a witness—*a* but if in his testimony, he denies that he has any of the effects of the principal, or that he is indebted to him, the plaintiff will be allowed to bring any other proper evidence to prove the fact, and is not concluded by the testimony of the garnishee. *b* The plaintiff cannot object to the admission of the garnishee to his oath—*c* but he must appear and testify in person, and his deposition cannot be admitted. *d* Garnishee may shew any mistakes in a settlement, for which a note was given, and is the ground of the claim.

*e* The confession or acknowledgment of the principal, that the garnishee did not owe him, has been admitted as proper evidence, because the plaintiff comes into the place of the principal, for the purpose of recovering the debt of the garnishee: who, in case of an action brought directly against him by the principal, might avail himself of such acknowledgment, and he shall not be deprived of that advantage in this action.

*f* In action by foreign attachment, the defendant in the original suit cannot plead, that he is not an absconding debtor; because if the writ be otherwise well served, it is sufficient to hold the defendant to trial; but the garnishee may plead in bar, that the principal

*a* DeWitt, vs. Baldwin, Sup. C. 1793. *b* Vaughan, vs. Sherwood Sup. C. 1793. *c* Byard, vs. Stewart, Sup. C. 1793. *d* Fowler, vs. Spelman, Sup. C. 1791. *e* DeWitt, vs. Baldwin, *f* Hubbard, vs. Brown, S. C. 1798.



principal is not an absconding debtor, for if he be not, he is not liable to the action. Where a recovery is had by force of this action, and the estate of the principal, by process and judgment of law taken from the garnishee, he is discharged from the principal : and in action brought against him, may plead the general issue, and give the statute in evidence. The garnishee, if judgment is rendered in his favour, is entitled to his cost.

*a* Tho a thing in action cannot legally be assigned, yet equity will so far protect such assignment, that where it shall appear on trial, that the debt was bona fide assigned, before the service of the original writ, it shall not be liable to be taken by this process. *b* Where a note was assigned, and by process of foreign attachment, the creditors of the assignor recovered it from the promisor, tho he gave notice of the suit brought against him, to the assignee, and made all the defence in his power, on the ground of the assignment, it was held in an action brought by the assignee, in the name of the assignor, that tho the note was assigned, yet the recovery had against the promisor, should bar the action, because the payment was compulsory in the course of law, and ought to exonerate him. *c* Two garnishees cannot be joined in a scire facias, unless they are joint debtors, or agents.

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#### CHAPTER SEVENTEENTH.

#### OF ACTIONS ON STATUTES.

**W**E have hitherto treated of actions at common law ; but where a person has a right of action, given him by virtue of some statute, it is necessary for him to bring his action on that statute, and he cannot declare generally, as at common law.— There are several kinds of actions, grounded on statutes, which I shall consider separately.—

1. Of Action of Debt on Statutes. The general rule of law is, that wherever a statute prohibits a thing, as being an immediate offence, against the public good in general, under a certain penalty, and the penalty, or part of it, is given to him  
who

*a* Fobbs, vs. Brewster. Sup. C. 1790. *b* Hooper. vs. Brown, Sup. C. 1793.  
*c* Stuart, vs. Brewster and Boardman, Sup. C. 1793.

who will sue for it ; any person may bring his action, and lay his demand as well for the state, as himself ; but unless the penalty, or some part of it be given to some private person, such action will not lie. Penalties created by statute, may either be given to the person injured by the act, for which the penalty is incurred, or they may be given to any person, who will sue for the same—when such person is called a common informer, and the suit a popular action ; the penalty is sometimes given, partly to the public, and partly to the party injured, or to a common informer, or for the benefit of some corporation.

Action of debt, will lie in all cases where the penalty is certain, and fixed by the statute. Where the whole forfeiture, or penalty, is given to some particular person, this action will lie in his name only ; but if part of the penalty be given to the public, and part to the individual, then the state must be joined in the suit.

Where a statute gives a certain sum to the party injured, and inflicts a certain fine, to be paid to some public treasury, there the plaintiff may either bring his action separately for the recovery of the penalty payable to himself, or may join the state in his suit, and then the defendant may be subjected to pay the fine to the state. But where the penalty is divided, and part is to be paid to the public, and part to the party injured, or where the action is given to some common informer, the state must be joined in the suit. Where the suit is intended to recover any penalty, more than belongs to the party suing, it must be laid as well for the state, as for the party himself, even tho it being going to some corporation, or a third person, and it must be alledged, that a right of action has accrued to them, to recover the same. In an action of debt on statute, the plaintiff need not recite the statute, but may barely count upon it. If he takes upon himself to recite the statute, and materially varies from it in a substantial part, it is fatal ; but an immaterial variance, will not be ill. Action of debt, will not lie upon a statute where the consequence of a conviction, is to subject the party to a corporal punishment.

2. Assumpsit will lie on Statutes, in all cases where debt will.  
Of

3. Of actions on Statutes, literally so called.—This is a form of action, peculiar to this state, and may be considered as directly founded on the statute. It is very singular for its simplicity. It has not the form of debt, or assumpsit—Without assuming the shape of the fiction of debt, on which the action is supposed to be grounded, it is brought directly for the penalty, or forfeiture. It recites, or counts upon the statute, in the same manner as in debt, then alleges the fact that incurs the penalty—and demands the same. It is an action in point of form, founded on the plainest principles of common sense, regardless of legal fiction, and technical formality.

This action will lie, not only in all cases where debt will, and is so far governable by the same rules; but will also lie in some cases where debt will not: where the penalty is not precisely fixed by law, but only according to a certain rate, dependant on the facts proved, and to be ascertained, and estimated by the court: as in the cases of actions on the statute respecting trespasses, or on cases where treble damages are given. This action however, like the action of debt will not lie, where the consequence of the conviction would be to subject the defendant to a corporal punishment, nor on the statute to prevent disorders in the night season, or against breaches of the peace. The general description of this action is, that it is a remedy given to the party in all cases where any right is created, or penalty given by statute, whether the sum be previously fixed by statute, or whether it depends upon a calculation, or estimation by the court. This remedy has therefore rendered unnecessary, the action of debt on statute—tho it is still in use.

In all cases, where a right of action is created by statute, it is necessary that the action be brought on the statute, and not generally as at common law. \* The following point was settled, in the case of Spalding against Weeks, and others, a society committee, on writ of error before the superior court. The plaintiff was elected a society collector, and refused to accept, upon which the defendants in error, the society committee, brought their action to recover the penalty incurred by force of statute. It was an action

on the statute, and the payment of the penalty was not negated. For this there was a demurrer to the declaration, which was adjudged sufficient in the county court, and on writ of error, the judgment was affirmed on this principle, that tho in action of debt on statute, the payment of the penalty must be negated, yet that this action is of a different nature, and by long and immemorial usage had become established, and that it was not necessary to negate the payment of the penalty.

4. Actions, or Informations *qui tam*, upon statutes, will lie in cases where some offence is created by statute, and a certain forfeiture, or damages to be estimated by the court, are given to the party injured, and a fine inflicted, payable into some public treasury, and also corporal punishment. On all such statutes information *qui tam* will lie, and it partakes of a criminal prosecution; but there are some instances where this action will lie, by the practice of our courts, as on the statute respecting breach of the peace, and to prevent disorders in the night season, tho no corporal punishment can be inflicted, and the offender is only liable to damages, to the party injured, and to pay a fine to the public, at the discretion of the court. But excepting these two instances, I believe this kind of action will only lie, in the cases where corporal punishment is to be inflicted, as on the statutes against forgery, perjury, and theft.

This is a motley kind of action, and originated from the practice of courts of law in this state. The courts have lately decided that it partakes so much of actions of a criminal nature, that the parties cannot appeal. All informations *qui tam*, must be as well in the name of the state, as of the informer: the facts to constitute the offence must be stated in the same manner, as in an indictment, and the declaration must conclude not only against the statute, but against the peace.

There is a material distinction between the other actions on statutes and this, as it respects the mode of process. In the former, the ordinary notice in civil suits is required to be given to the defendant, but in this, a complaint or information is exhibited to a court, or some justice, subscribed by the informant, on which a  
warrant

warrant issues to apprehend the body of the defendant, and him bring before the court, who may proceed instantly to trial. But if the body of the defendant cannot be found, the process fails, for service of the writ cannot be made in any other mode.

When we consider the process to be the same as in criminal prosecutions, and that the person is to be arrested, and had before the court, it is apparent, that public policy will not permit, or public justice require, that this prosecution should be extended farther than I have mentioned. There is a propriety in applying it in cases where corporal punishment is to be inflicted, and also, in the cases of breaches of the peace, and committing disorders in the night, as these are offences of a public nature, and are mala in se, or bad in themselves. But in cases where actions are prohibited by positive statute as a political inconvenience, such mode of process could not be justified. And according to the present practice, the liberty of the citizen can hardly be said to be well secured, for every person is liable in certain cases to be arrested on *qui tam* prosecutions, at the suit of a private person, who is not under oath as an informing officer, and brought to immediate trial, without the notice given in civil suits.

All actions on statutes may be said to depend upon the form of the statute, and where damages are given to some private person, and some punishment is inflicted by the public, the law authorises the joining of the party and the public. The particular form of action must depend upon the nature of the crime, and the penalty, or punishment. Where the penalty is pecuniary and for a sum certain, debt or assumpsit will lie, or action on statute. Where the penalty is pecuniary and uncertain, but the act bad because prohibited, and not bad in a moral view, there action on statute will lie. As in trespasses for cutting timber: but where the punishment is corporal, or the offences bad in themselves, and of a public nature; so that the offender ought to appear in person for trial, as breaches of the peace, then informations *qui tam* can only be brought: and in the statutes against breaches of the peace, and committing disorders in the night, there is an express authority to arrest the defendant forthwith, and bring

him

him to trial : which is undoubtedly the reason why informations *quod tunc* have been maintained on these statutes.

Where a warrant issues from a single minister of justice, and the sum in demand, is beyond his jurisdiction, he must bind the defendant to appear at the next court to answer to the complaint, unless it appear on enquiry, that the prosecution is merely through mistake, and without any probable cause.

Where any corporal punishment is to be inflicted, this is the only kind of action which the private party can bring and join the public in the suit, for where corporal punishment is to be inflicted, debt, assumpsit, or action on statute will not lie.

I have mentioned the particular statutes on which this process may be grounded. It is unnecessary to go into a consideration of them all : but the prosecution on the statute, against committing disorders in the night is so singular, as to deserve some illustration. The statute is, that when any disorders and damages are done in the night season, upon complaint speedily made thereof to any court, assize, or justice of the peace, they are empowered to issue forth a writ, or writs to bring before them any suspected person, or persons and examine them concerning such disorders and damages : and if such suspected person, or persons cannot give a satisfactory account to such court, where they were, when such disorders and damages were done, and that they had no hand in doing the same, they shall be answerable for all damages that the complainant has sustained, and such fine, or punishment as the court shall order not exceeding five pounds. *b* It is not the object of this statute, to create any new offence, or to give to parties a new right of action. It only gives a new form, for the purpose of furnishing a new mode of proof, because of the difficulty of obtaining common law proof, with respect to trespasses committed in the night. The mode is, that where the complainant can render it probable, that the person suspected committed the trespass, that the burden of the proof shall be thrown upon him, and if he cannot convince the court of his innocence, he shall be convicted.

B b

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*a* Scott, vs. Turner, Sup. C. 1790. *b* Larrabee, vs. Tracy, S. C. 1794.

The complaint must be in the name of the state, as well as of the party: the facts must be charged direct, and not, that the complainant suspects the defendant: the injury done must be described in the usual manner. Tho the facts are thus charged directly against the defendant, yet the complainant is not bound to adduce direct proof: But he must shew, that the facts were committed in the night season; he must prove certain circumstances that render it probable, that the defendant did the facts, and that he is more to be suspected than any other person: the prosecution must be commenced in such season as to give the defendant a fair opportunity to shew where he was, and that he did not do the facts, if he is innocent: and then under these circumstances upon examination, to which he is entitled, if he cannot give the court a satisfactory account where he was, and that he did not do the facts complained of, the court may find him guilty. This leads to a train of probable and presumptive proof, upon which a conviction may be very safe. There can be no doubt but that this process, has not only detected, but prevented the commission of many injuries in the night; and if courts conduct with proper prudence and caution, there is no danger to be apprehended from it: but it is a dreadful weapon in the hands of the weak, the ignorant, and the prejudiced. It is strange, that courts should be vested with power to inflict fines, where the conviction is grounded on probable proof.—It would have been sufficient to have ordered the payment of damages to the party injured. • Informations *qui tam*, for any matter of a criminal nature, may be prosecuted in the county where the complainant dwells, tho the crime was committed in another county.

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#### CHAPTER EIGHTEENTH.

#### OF THE WRIT AND PROCESS.

**H**AVING in the foregoing chapters treated fully of the several kinds of actions that may be brought for the redress of civil injuries, I now proceed to unfold the manner, by which these actions can be pursued to effect.

1. I shall explain the Writ.— *a* This is the commencement and foundation of the action.—It contains a command to the sheriff of the county, his deputy, or some constable of the town, where the defendant lives, to give notice to the defendant, whose place of residence, or dwelling must be described, to appear before some proper court, the place and time of session being mentioned, to answer to the plaintiff, whose place of dwelling must be described in the writ. The writ must be signed by some magistrate, justice of the peace, or clerk of the court. Under magistrates may be comprehended, the Governor, the Lieutenant-Governor, the Assistants, and Judges of the superior court, who are in virtue of their offices justices of the peace throughout the state, and can sign writs that shall go through the state. Judges of the county court and justices of the quorum, may by a late statute, sign writs that may be served in any part of the state, if they are returnable to the court to which they belong. Justices of the peace, and clerks of the county court, can sign writs that are to be served and returned to some court in their respective counties. The authority when they sign writs must certify, that the duty of six shillings has been paid on writs returnable to the superior court. Two shillings on writs returnable to the courts of common pleas : and one shilling on writs returnable to justices of the peace.

The authority signing writs, must in case of attachments, take sufficient security that the plaintiff shall prosecute his action to effect, and answer all damages in case of failure—So he must in case of summons where it shall appear that the plaintiff is unable to pay a bill of cost, if recovered against him : and if the plaintiff be not an inhabitant of this state, bonds for prosecution must be taken of some substantial inhabitant in this state.

Where it shall be found inconvenient and attended with great charge and expense, to direct the writ to some sheriff, or constable, then the authority may direct it to some indifferent person, by inserting his name in the direction of the writ, and his reason for such direction, and this must be done by his own hand, to evidence the direction to be his own act, otherwise the writ will be abatable. *b* A justice of the peace, may sign a writ in favour of the

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*a* Statutes, 3. *b* Windham, vs. Hampton. Sup. C. 1790.



town in which he lives, and may direct it to an inhabitant of that town to serve as an indifferent person, who is not required by law to take any oath. It is sufficient to name the indifferent person and call him such, without describing his place of abode. A direction to a sheriff, or indifferent person, is ill ; but to a sheriff, and indifferent person, would be good.

The certificate of the authority, who signs the writ, of the necessity of directing it to some indifferent person, is conclusive evidence, and the defendant cannot plead in abatement, that no such necessity existed. This gives them the power to make special deputations when they please, by which the business of known officers may be materially affected : but they ought to be extremely cautious in exercising this discretionary power, and they ought never to do it when known officers can be had by taking proper pains.

The writ which consists of the mandatory and directory part, with the description of the parties and the court, is to be accompanied with a declaration, containing the substance of the action. According to the English practice, the declaration does not go with the writ, but after the return and appearance of the parties it is filed in court. The practice with us seems to have been established at the commencement of our government, and was introduced by statute. In treating of the various kinds of actions, I had occasion to enter into a minute consideration of declarations for the purpose of illustrating the nature of actions. It will be unnecessary to remark further on the subject in this place ; for what remains will be discussed in the chapter of pleas and pleadings.

2. Of Process—which is of two kinds, summons and attachment.

1. Summons is merely giving notice to the defendant to appear at some court described in the writ, and is served by the officer's reading it in his hearing, or leaving an attested copy at the place of his usual abode. If the writ be returnable to the superior or county courts, it must be served, at least twelve days inclusive, before the setting of the court : if it be returnable to an assize, or Justice of the peace, then six days inclusive : but if it be a suit against

against a corporation, returnable to an assize, or justice of the peace, the writ must be served twelve days inclusive, before the sitting of the court. When the suit is by foreign attachment, or against some officer, for a default in his office, as against a *sheriff*, or constable; on a receipt for an execution, the service of the writ must be fourteen days inclusive, before the sitting of the court. In actions on joint securities and contracts, where all the defendants are not inhabitants of this state, the service of the process on such of them as are, shall be sufficient notice to maintain the suit against all, and if any are aggrieved by the judgment, they may be relieved by *audita querela*. When a person not an inhabitant of this state, happens to be here, a summons may be served upon him by reading. If he be not an inhabitant of this state, and has an attorney here, service may be made by leaving a copy of the writ with the attorney. All writs returnable to county courts, shall be returned to the clerks on the day preceeding their session.

• Visible property within this state, will give the court jurisdiction of actions between persons belonging to other states, and in like manner invisible property in the hands of a debtor, taken by foreign attachment, must give the court jurisdiction of actions between such persons.

2. Attachments, are to be served and returned within the same time as summons. The difference between them, consists in the manner of service. An attachment contains a command to the officer, to attach the goods or estate of the defendant, and for want thereof, his body, and to have him to appear before the court.—When personal estate can be found, it is the duty of the officer to take it, whether shewn and tendered to him, by the debtor, or not, instead of taking the body, tho offered, and tho he refuses to offer personal estate. If personal estate cannot be had, the officer may take real estate, but not otherwise. When personal estate is attached, the officer takes it into his custody, and may retain it, till sixty days after rendering final judgment. He must hold it ready to be taken by the execution, and if it be not levied upon within that time, the estate is discharged from the attachment.

b The officer may receipt the estate to any person who will be liable

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to redeliver it during the sixty days after rendering final judgment, if demand be made, where the estate is not incumbered by a prior attachment, if so, then for sixty days after the incumbrance is removed.

When an attachment is levied on personal estate, a copy must be left with the defendant, or at his usual place of abode if within this state, if not, and if he has an attorney, then with such an attorney, and also there must be indorsed on the copy a description of the estate attached. If he be not an inhabitant of this state, and has no attorney here, no copy can be left, but the attachment of the estate, will be a sufficient service of the writ, to authorise a trial of the action.

When real estate is attached, there must be a copy left upon the same principles as above, on which there must be a description of the land attached, and a like copy must be left with the town clerk, (or in his office) of the town where the land lies, within seven days next after the attaching the estate and before the term of serving the writ expires. The service completed in this manner shall hold the land against any other creditor, or any purchaser—The execution must be taken out and the levy and the return completed within four months after final judgment, unless incumbered by a prior attachment, and then within four months after the incumbrance is removed, otherwise such attachment will not hold against subsequent attachments or conveyances.

When no personal estate can be had, the attachment may be levied on real estate, if the creditor chuses—but the debtor cannot tender the same, to avoid the attachment of his body. If the attachment be levied on the body of the debtor, and he shews sufficient personal estate, or the officer finds it, he may release the body and levy on the personal estate. But if no personal estate can be had, and the officer levies on his body, if the defendant offers bail consisting of one or more substantial inhabitants of this state, of sufficient ability to respond the judgment that may be recovered in the action, the officer is bound to take it. The bail shall become bound to the officer, in a sufficient sum, conditioned for the appearance of the defendant before the court to which the writ is made returnable, and then the person arrested, shall be at liberty from such arrest. If an officer refuse to take personal estate when found

by him, or tendered, if sufficient, and take the body, or having arrested the body refuse sufficient bail when tendered, he is guilty of false imprisonment, and will be answerable in an action of trespass. But if the defendant has no personal estate, and cannot procure bail for his appearance at court, the officer having obtained a mittimus from a justice of the peace, must commit him to goal, where he may be detained till five days after the rendering final judgment in the action, and if the execution be not levied upon him within that time, he may be discharged from prison.

All suits brought for the trial of the title of land, or wherein the title of land is concerned, must be made returnable to some court in the county where the land lies. All suits made returnable to the superior, or county courts, shall be made returnable to the court in that county where the plaintiff, or defendant dwell, if inhabitants of this state; if not, then in such county where they may happen to be at the commencement of the suit. When the writ is made returnable before an assitant, or justice of the peace, the action must be tried in that town where the parties, or either of them dwell: unless there be no authority in the town that may lawfully try the case, then the writ may be made returnable before proper authority in one of the next adjoining towns. It is not necessary that the parties become legal inhabitants of a town, to give the court jurisdiction. Actual dwelling, or residence will be sufficient.

Having considered the manner of serving writs, I proceed to consider the appearance of the parties, which is the object of the process. All writs being returned to the clerk of the court of common pleas, the day before the sitting of the court, with proper indorsements of service by the officers, the clerk makes a docket of them, and the actions are called in the afternoon of the first day of the session of the court. Every plaintiff being three times called, who does not appear by himself, or attorney to prosecute his action, becomes non-suit, and is liable to pay all costs and charges to the defendant if he appear, and for the entry of the action, as if the same had been prosecuted in court.— If the plaintiff fail to appear on the first day of the court, he cannot be ad-

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mitted at any time afterwards, even on the second day to appear and revive his action, but it is discontinued, and he is out of court. Every defendant, the writ having been duly served, and returned, who does not appear having been three times called, shall be defaulted, and judgment shall be rendered against him, unless he come into court, on or before the second day, and move for trial, which shall be allowed upon his paying down the cost to that time, to the adverse party, who shall then pay for entering the action a new.

If the defendant be not an inhabitant of this state, or a sojourner therein, or is absent out of the same at the time of serving the writ, and does not return before the first day of the setting of the court, then the action shall be continued to the next court: if the defendant does not then appear by himself or attorney, and lives, or is so remote, that it is not probable that notice of such suit would be conveyed to him, during the vacancy, then the action may be continued once more, and if the defendant does not then appear, judgment may be rendered against him on default: but in such case, execution shall be stayed until the plaintiff shall have given, or lodged with the clerk of the court, a bond with one or more sufficient sureties, to the adverse party, in double the value of the estate, or sum recovered by such judgment, to make restitution and pay back the same, or so much as shall be recovered on a suit therefor, to be brought within twelve months, if the judgment shall be reversed, annulled, or altered—Real estate taken upon such execution, cannot be aliened, till after the expiration of twelve months, or till after a new trial had on a suit brought within the twelve months.

When both the plaintiff and defendant appear on the first day of the court, they may proceed to trial, or become non-suited, or defaulted at any time of the court: there is no provision by law, which necessarily delays the cause, and no delay can be obtained unless the justice of the cause requires it. The court are therefore vested with the power to order a continuance of the action in any stage on motion by either party, when it appears just and reasonable for the purpose of giving them a fair opportunity to prepare for trial. No defendant whose person has been attached and let to bail shall be admitted to appear and plead, or defend in the action, until he has in court given special bail with sufficient sureties to abide final.

final judgment, if the plaintiff require the same. The courts have right to establish rules with respect to the time in which the plaintiff shall require bail, and if he neglects to require it within such time, he shall be considered as waving his right to demand it.

In no respect is there a greater difference between our practice, and that of England, than in the writ and process. In that country the writ issues separately from the declaration, and the defendant cannot know the ground of the action, till after he appears in court, and the plaintiff has filed his declaration. This renders it necessary that there should be an appearance of the defendant, and no judgment on default can ever be rendered against him in the action till after an appearance; for until the declaration is filed, the claim, or demand of the plaintiff is not stated and known, so as to enable the court to render any judgment. They have therefore adopted a very lengthy and circuitous mode of process, to compel the appearance of the defendant to answer to the action. It will be tedious and unnecessary to go into a minute detail of the English mode of process. A few remarks will shew the difference, and demonstrate the superiority of our own.

The action may be commenced with a summons, or mere notice to the defendant to appear. If he neglects the summons, an attachment may issue, and pledges taken to be amerced in case of his non appearance: or they may commence the process by attachment. If after the attachment the defendant does not appear to answer to the action, a writ of distress may issue, by which he may be stripped of all his estate. If this fails to enforce an appearance, then a *capias* may go to take his person, and also an alias, and pluries—Then a writ of exigent, which requires the sheriff to cause the defendant to be proclaimed, exacted, or required in five county courts successively; if he appears on such proclamation, the sheriff must arrest him; if not, then he is to be out lawed by the coroners of the county; by which he is put out of the protection of the law, disabled to maintain any suit, and subjected to a forfeiture of all his goods and chattels to the king. If he should then appear; he might be taken by a writ of *capias ut lagatum*, and imprisoned till the out lawry be reversed, which may be done for

## OF PLEAS AND PLEADINGS.

**P**LEADINGS signify the allegations, or mutual altercations between the parties. They were originally oral, but must now be reduced to writing. Their object is by a logical process, to bring the matter in dispute to a single point, which may fairly be tried and determined.—They close either in an issue at law, which is called a demurrer, or in an issue of fact.

Tho the declaration issues with the writ, yet in legal consideration it is deemed a part of the pleadings, and must be treated of as such in this place. I have already pretty fully discussed this subject under the head of actions, but some things yet remain to be explained and illustrated.

§ The declaration, or count as it is frequently called, contains and sets forth at large the plaintiff's demand, and the foundation of the action. The gist and essence of the action on which the right of recovery is grounded, must be alledged with clearness and certainty. All the facts must be stated which are necessary to authorise the court to render judgment, and which will furnish a rule by which they can ascertain the damages that ought to be given.

• It must appear that the plaintiff has done every thing necessary to give him a right of action, If the debt or duty is dependant on a particular demand, or upon giving notice, it must be averred in the declaration that demand has been made, and notice given.

• Where a note is payable in a collateral article, a special demand must be laid, and a general one will be insufficient.

• Where the interest or estate commences on condition, whether the condition is to be performed, or the act to be done by the plaintiff, defendant, or any other person, and whether it be affirmative or negative, the plaintiff ought to shew it in his declaration, and aver a performance of it.—But if the interest or estate vests instantly and may be defeated by some subsequent matter, this need not appear in the declaration, but must be pleaded by him who wishes to take advantage of it.

But

• 3 Black. Com. 293. 4 Bac. Abr. 1. § 3 Black. Com. 293. c 4 Lac. Abr. 8. d Dean vs. Woodbridge, Sup. C. 1790. e 7 Co. 20.

*b* But where by the same contract or deed, each party is to do something advantageous to the other, and on which there is not a mutual remedy, so that the fulfilment of one contract is the consideration of the other, the plaintiff must aver in his declaration that he has performed what was to be done by him, but where there are reciprocal contracts, and one is the unconditional consideration of the other, the declaration need not state a performance. *c* The declaration must contain such direct and positive averments, and certain affirmation that it may be traversed. If the facts are alleged in such a vague and uncertain manner, that they are not traversable, the declaration will not be cured by verdict, because it is a defect in substance.

*e* In the description of the thing declared for, the law requires that there be such particularity and certainty, that it may be known and distinguished : but does not require any greater certainty than the nature of the thing would admit of. *d* All persons who are the joint owners of any estate, or who have a joint interest, or right of recovery, may join, but if either will refuse to join in a suit, his right may be severed by summons and severance, but where two persons are assaulted or slandered, they cannot join, for the assault and slander done to one is not done to the other, and therefore the right of action cannot be joint. The plaintiff may join in the declaration all persons who are jointly concerned in the commission of a tort, or who have jointly, or jointly and severally entered into a contract, or he may bring his action against them severally, unless it be upon a joint contract, where all must be joined. *e* But two defendants cannot be joined in a declaration for slander, for the slander of one is not the slander of the other. *f* Neither can several plaintiffs join in an action against one for a vexatious suit, for the vexation done to one, does not affect the other.

*g* It has not been the usual practice here to make several counts in the same declaration—but it is in England, and is warranted by the common law. The plaintiff may lay several counts for the same thing, and also distinct counts for distinct things. Thus in an action of assumpsit for goods sold and delivered, the plaintiff may count

upon  
*a* Sand. 319. *5* Co. 10. *4* Co. Lit. 303. *e* Stile, 136, 235. *d* Dyet. 370.  
*e* Cro. Jac. 647. *f* Kirb. Rep. 145. *g* 3 Black. Com. 295. *4* Bac. Abr. 9.



upon a price settled and agreed on with the defendant, but that he should fail of proof, he may ~~enter~~ upon a promise to pay as much as they were worth : and so in several different shapes, and then conclude by averring that the defendant has not fulfilled any of his engagements, and if he can prove the case laid in any one of the counts, tho he fails in the rest he shall recover proportionable damages. This practice is calculated to give the plaintiff a fair opportunity to recover his demand, and does not subject him to the expence of several suits, where he is uncertain how his proof will apply : but by laying several counts, he may form one which will correspond with his proof, and frequently save the expence of a second suit.

a Several counts for distinct things, but of the same nature, may be joined in the same declaration. Such as actions founded on contracts, as debt, and covenant : actions founded on torts, as trespass with force and arms : and actions on a fraud, as trespass on the case. The actions must not only be for things of the same nature, but they must be such that they may have the same mode of trial, and be terminated at the same court. Actions therefore, where one is appealable and the other is not, cannot be joined : but two notes of hand, whether both are, or are not appealable, may be joined in one suit. b So, two judgments rendered on suits of like kind, and dependent between the same parties, and on similar principles, may be joined in the same writ of error. This joinder of actions might some times save expence, and tho rarely practiced, is clearly maintainable by our law.

When the plaintiff has stated his case in the declaration, it is incumbent on the defendant to make his defence and to put in a plea, or the plaintiff will recover judgment by default or nihil dicit.

The several courts in this state, have adopted certain rules respecting the time, within which pleas are to be given, which are merely local, and therefore cannot with propriety be enumerated in an elementary treatise. It is sufficient to observe, that they have power to make such regulations, and orders respecting pleadings as tend to expedite and facilitate business, and promote justice. The defendant when he comes to make his defence, may put in pleas of two kinds : dilatory pleas, and pleas to the action.

Dilatory

Dilatory pleas, are such as tend to delay or put off the suit, and are also called: pleas in abatement: pleas to the action are such as dispute the very cause of the suit: I shall consider each kind,

1. Of dilatory Pleas, or Pleas in Abatement. According to our practice, the first plea to be exhibited, where the parties appear for trial, is a plea in abatement, which will include any exception to the jurisdiction. The plea in abatement therefore, must comprehend every matter that the defendant has to offer under this plea, whether it goes to the point of jurisdiction, or any other point, and he may plead several distinct matters at the same time by way of abatement. The several matters which are usually pleaded in abatement, I shall briefly remark upon.

1. Of Pleas in Abatement to the Jurisdiction. I have already stated the jurisdiction of courts, and whenever an action is brought before them which is not within their jurisdiction, it must abate. The defendant may take advantage of it by pleading, but if he waves a plea to the jurisdiction, the court in any stage of the case on discovering that it is not cognizable by them, are bound to dismiss it. For the principle of the English law, that he who does not in the first instance plead to the jurisdiction, admits it, has not been adopted here. Thus where an action of trover was brought before a justice of the peace, for bark taken on certain land described in the declaration, the defendant pleaded title to the land, and the action was removed to the county court, and came by an appeal to the superior court, who when the action was on trial on the general issue, dismissed it, because title of land could not be set up and pleaded in action of trover.

2. Of abatement by reason of the disability of the person of the plaintiff.

• Alien enemy cannot maintain any action either real or personal. • An alien friend may maintain personal actions, for the benefit of trade and merchandize, but not real actions, as they are by statute excluded from holding lands, with an exception however in favour of the subjects of Great Britain holding lands here previously to the American revolution, or where they have descend-

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ed since that time. These lands were secured to the British subjects, by the treaty of peace, and they are authorized to sell and dispose of them by the statute of this state : and by an equitable construction of this statute, the courts have determined that the proprietors have a right to maintain actions for their possession.

a It has been determined that an action is not maintainable in this state upon a contract made in a foreign country, between citizens of that country, and to be there performed, tho the defendant came to reside here. b But where a contract is made in any of the other states in the Union by the citizens of such state, if the defendant comes occasionally into this state, the plaintiff may bring his action against him and hold him to trial, because such action is transitory, and the citizens of the United States have the same right to sue here as citizens of this state. An infant must sue by guardian, or next friend. A person under the care of an overseer, or conservator, cannot maintain a suit without adjoining them in the declaration.

### 3. Of Abatements by reason of the privilege, or disability of the person of the Defendant.

No member of the general assembly during the session thereof, or in going to or from the same shall be arrested, or sued, or compelled to answer to any civil suit. In all cases where the personal attendance of a party, or a witness upon a court is necessary, and they cannot attend for fear of arrest, and imprisonment, either on mesne process or execution, such court may grant them protection from arrest and imprisonment in all cases of a civil nature, during the time necessary to go there, while attending such court, and returning home.

When an infant is sued, his guardian ought to be cited to appear and defend : so ought overseers and conservators, when the persons under their care are sued : c but the court will not abate the suit—the action may be continued till the overseer or conservator are notified. The court may appoint a guardian to an infant, to defend in the suit.

### 4. Of Abatements by misnomer, and misdescription. Wherever

a Kirb. Rep. 25.    b Idem, 408.    c Idem, 174.    d 1 Bac. Abr. 6.

ever the plaintiff or defendant are misnamed, or the place of their abode misdescribed, the defendant may plead it in abatement : but must set forth his right name and place of abode, so as to give the plaintiff a better writ. A misspelling, if the name or place can be rightly understood, will not abate the writ. *a* Misnomer, or want of service or notice to one of the defendant in trespass, can be taken advantage of by him only who is misnamed, or on whom the writ is not legally served, and not by others, who are well described.

5. Of Abatement by reason of Coverture. *b* If a married woman sue without joining her husband, or be sued without being joined with her husband, the suit shall abate : if a single woman commences a suit, and then intermarries, she abates the suit : but if a single woman be sued, and then takes husband, she shall not by her own act, abate the suit of the plaintiff.

6. Of Abatement by the death of either of the parties. *c* It is enacted by statute, that when any suit shall be depending in any superior or county court, and the plaintiff before final judgment shall die, it shall not abate, if it might originally have been prosecuted by his executor or administrator, who in such case may if they see cause, enter and prosecute the same. If the defendant in any action pending in court, shall die before final judgment, the same shall not abate, if it might originally have been prosecuted against his executors, or administrators : and the plaintiff or the executor, or administrator of such plaintiff may have a scire facias against the executors, or administrators of such deceased defendant, to shew cause why judgment should not be rendered against them, which being duly served at least twelve days before the court, to which the same is returnable, and returned, the action shall proceed to final issue according to law. If in any action pending in court, there shall be two or more plaintiffs, or defendants, and one or more of them die, pending the suit, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ shall not abate, but such death being suggested on the record, the action shall proceed.

7. Of Abatement for some defect in the writ. Where the writ is variant from the forms prescribed by law, or adopted by practice,

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*a* Sup. C. 1792, *Kaples and Calkins, vs. Coleman*  
*c* Statutes, 2.

*b* 1 Bac. Abr. 9.

where the court is not rightly described, or the proper time mentioned, where the writ is not lawfully signed, or the duty properly certified, the writ shall abate. Where an action is brought upon some writing, and a profert laid, if upon oyer it appear that there is a material variance between the writing declared on, and that produced on oyer, it may be pleaded in abatement. <sup>a</sup> In an action on bond, the defendant prayed oyer and recited the conditions, and concluded by a demurrer to the declaration, and contended that he might as well take advantage of a variance in this manner as by pleading it specially : but the court held, that a good bond appeared to be declared on, and if the defendant would avail himself of a variance between the bond declared on and shewn on oyer, he should have done it by a plea in abatement, or a demurrer to the evidence.

The general rule is that whatever goes to the writ may be taken advantage of under a plea of abatement : and that whatever respects the validity of the declaration must be taken advantage of under a demurrer. <sup>b</sup> It is also a rule, that such matters are to be pleaded in abatement as operate against the particular action, or form of it, or some circumstantial defect or disability : but that whatever goes to the merits of the action and destroys it, and forever disables the plaintiff from recovering must be pleaded in bar. Some things however may be pleaded both in bar and abatement, as alienage.

8. Of Abatement by reason of the pendency of another action for the same thing. <sup>c</sup> It is a general rule that wherever it appears of record, that the plaintiff has sued out two writs against the same defendant for the same thing, the first not being determined, the second writ shall abate ; for the law abhors a multiplicity of actions, and will not allow that a man shall thus be twice arrested or his goods twice attached for the same thing. It is not necessary that both actions should be pending at the time of exhibiting the plea in abatement, for if there was a writ in being, and served at the time of suing out the second, it is plain that the second was vexatious, and ill from the beginning, and therefore could not be rectified by a subsequent determination of the first : but it must appear clearly that both actions are for the same matter and thing.

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<sup>a</sup> Kirb. Rep. 106,    <sup>b</sup> 1 Bac. Abr. 14.    <sup>c</sup> Idem, 13.

The law is so watchful against all vexatious suits, that not only, it will not suffer two actions of the same kind, to be pending at the same time for the same thing, but not even two actions of a different kind. When trespass is brought, trover will not lie for the same thing. If a second writ is brought the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. If a writ should be served, and the plaintiff should then discover some mistake, or defect in it; he might amend or alter, and procure it to be served again, which would not abate it—because there would not be two actions for the same thing—but only two services of the same writ. So in such case, if he obtains a new writ and serves it and does not pursue the first it will be good, for this is not for vexation.

9. Of Abatement of writs by reason of defective service. I have already described the mode of serving writs. Any substantial deviation by the officer is matter of abatement. Where the service of the writ is by copy, it is necessary that the copy compare with the original writ, and if there be a variance, the defendant may plead, that at the time when the copy was left in service, there was and still is a variance, which must be pointed out and described. The general rule is, that where there is such a variance between the copy and the original writ, as would abate the writ, if it were like the copy, then the writ shall abate. Where an attachment is served, if the copies were not right, the writ must abate unless there was also a reading of it, and then it may be good service as a summons. But if the officer attaches the estate of a stranger or does not properly describe the estate, yet if he leaves a good copy with the defendant, it shall be good service as a summons, though not as an attachment: for the defendant has notice which is all the law requires to hold him to trial. If a writ is served by copy and the officer by mistake leaves it at the house of some other person instead of the defendant's, this shall abate the writ.

10. Of the proper conclusion of a plea in Abatement. Such plea ought to conclude by praying judgment of the writ, that it abate. It is laid down as a general rule, where a plea intended to be in abatement, concludes in bar, that it shall be taken to be a plea in bar, and so where a plea in bar concludes in abatement, it shall

shall be taken to be a plea in bar, and judgment be rendered accordingly. This shews the necessity of closing properly all pleas, according to their nature.

Whenever the defendant pleads a fact in abatement, directly repugnant to some allegation in the writ, he ought to traverse such repugnant fact which may be replied over, and an issue in fact closed. As where the defendant pleads that he dwells in some town different from that mentioned in the writ, he ought to traverse the dwelling in the town mentioned in the writ.

11. Of the answer to be made to pleas in Abatement. A practice was formerly adopted to try pleas in abatement without any answer. If the plaintiff thought proper, he demurred or traversed in regular form, and if he pleased, he informed the court orally what he denied, and an enquiry was directed with respect to such facts, otherwise the plea was considered as being demurred to. But this loose practice has been discarded, and the settled principle now is, that all pleadings in abatement shall be regularly closed either by a demurrer, or an issue in fact, which shall be formally entered.

12. Of the judgment on pleas in abatement, and how far peremptory. \* When the pleadings close in a demurrer, if judgment is for the defendant, that the plea or rejoinder, as the case may be, is sufficient, then the writ abates.—But if the judgment be that the plea is insufficient, then the defendant will be ordered to answer over, and the action will proceed, as if no plea in abatement had been exhibited. But if an issue in fact be closed and tried either by the court or jury, it is final, and judgment must go in chief. For the defendant has his election to place his defence upon what point he pleases, and if he is willing to risque it upon a plea of abatement which closes in an issue in fact, and the plaintiff will accept of it, they have good right so to do : but the law will not admit but one issue in fact, in an action to be tried in the same court. The defendant may chuse the strongest ground of defence, and if it be an issue in fact, one trial shall be final in the court where tried. Thus in an action on a note of hand, if the defendant plead a misnomer or misdescription, on which issue is joined, and a verdict is found against the plaintiff, it is a perpetual bar to a recovery on  
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the note, unless the judgment can be removed by an appeal, or new trial. If the issue be found against the defendant, the jury must find as damages the sum due on the note, and the defendant cannot be admitted to make another plea. It may at first view appear singular that the trial of a collateral matter in a plea of abatement, should conclude the merits of the cause—But this practice is the consequence of the general principle, that but one issue is to be tried in any action.

When the defendant has exhibited one plea in abatement, and it has been adjudged against him, he cannot offer another plea in abatement : because in the first plea he may plead every matter however various and of course can have no occasion to make a second plea. *a* No writs are to abate for any circumstantial error, mistake or defect, if the person or the cause may be rightly understood and intended by the court.

13. Of the amendment of writs that have been abated. When judgment in chief is rendered upon issue in fact tried by the court or jury, no amendment can be made : but where a judgment is rendered upon demurrer, the plaintiff has a right to amend his writ upon the payment of cost : he may pay down the cost to the defendant and then make a good writ if he can : if he fails to make a good writ, the defendant may again plead in abatement on account of such defects as are made, or are not cured by the amendment, and so as often as amendments are made. *b* It is provided generally by statute, that all writs may be amended. But there are many instances where the facts pleaded in abatement, are such as destroy the plaintiff's action, and therefore the writ cannot be amended. Such are alienage, privilege, pendency of another suit for the same thing, defective service of the writ, and the want of a certificate of the payment of the duty. In these cases the defects are radical and cannot be cured. But where the defect is such that it can be cured, the plaintiff may always amend. If there be a misnomer, or misdescription, or if there be any defect in the writ which the plaintiff can cure, and he can make a good writ, he has a right to amend. *c* Pleas in abatement tried in the county court may be altered in the superior court. When the writ is amended, the defendant may plead a meritorious plea.

statutes, 2.

*b* Idem.

*c* Osborne, vs. Lloyd, Sup. C. 1791.



II. Of Pleas to the Action. For the purpose of handling this curious and intricate subject with the greatest perspicuity, I shall arrange my observations in the following order,

1. Of the General Issue. 2. Of special Pleas in Bar, and Pleas that amount to the General Issue. 3. Of Traverse. 4. Of Replication, Rejoinder and Surrejoinder. 5. Of Immaterial and Informal Issues. 6. Of Departure in pleading. 7. Of Duplicitie in pleading. 8. Of Demurrer. 9. Of altering and amending Pleas.

I. Of the General Issue. When the defendant contends the justice of the plaintiff's demand or the propriety of the action, he must make some answer to the declaration. When the defendant denies the truth of the whole declaration, and means to put the plaintiff to the proof of it, he pleads the general issue.

An Issue is defined to be a single, certain, and material point, arising from the allegations and pleas of the plaintiff, and defendant, consisting regularly of an affirmative and negative, which is to be tried by the court or by the jury, as the parties agree. It is either general or special. The general issue is calculated to put the whole facts in the declaration on proof, and a special issue is formed by the traverse of some fact in the course of special pleadings. The general issue is to be expressed in such words as amount to a denial of the declaration. In an action of disseisin, the defendant pleads that he has done no wrong or disseisin in manner and form as the plaintiff has alledged. In trespass with force and arms, and trespass on the case, that he is not guilty—In debt, that he owes nothing.—In assumpsit, that he did not assume and promise—And where the action is founded upon a specialty, and he denies the execution of the writing, he pleads that he did not execute the same, and that it is not his act and deed—which is commonly called a plea of non est factum. The plea ought to be closed by putting himself on the country for trial, unless the parties agree to a trial by the court.

In former times it was the practice in all instances where the defendant acknowledged the truth of the facts in the declaration, and depended upon some special matter of justification, that he must plead such matter specially,—But this was frequently found to be  
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very inconvenient, because when the parties run into special pleadings they were required to be managed with so much metaphysical nicety, that justice was sometimes entangled in forms, and it was very difficult to bring the merits of the question to a fair issue and trial. The legislature to remedy this inconvenience, have passed a statute, enacting <sup>a</sup> that the general issue, of not guilty, owe nothing, no wrong or disseisin, or any other general plea proper to the action, whereby the whole declaration is put upon proof according to the nature of the case, may be made by the defendant : under which general plea, the defendant shall have liberty upon the trial of the case upon such general issue, to give his title in evidence, or any other matter in his defence or justification, as the nature of the action may be ; excepting only a discharge from the plaintiff, or his accord, or some other special matter, whereby the defendant, by the act of the plaintiff is saved or acquitted from the plaintiff's demand in his declaration.

This statute has made a great innovation in the science of pleading, and has opened the way for a much fairer method to try the truth of disputed facts, than was before admitted. The parties are not reduced to the necessity of entering so frequently into the labyrinth of special pleadings, where they have often been so ensnared and entangled by their intricacy and perplexity, that it was impossible to bring the merits of the question to a fair issue, and where they were often exposed to loose causes founded in the clearest principles of justice by some technical inaccuracy and mistake. They may now upon the general plea, enter into a fair discussion of the cause, upon the broadest basis, without being limited to some special matter, or confined to a single point. This statute in some measure furnishes the same remedy which is given in England by a statute authorising the party to plead double by leave of the court : for upon the general issue, the defendant may take advantage of as many special matters by way of justification, as he has, and is not confined to the election of a single point, as in special pleadings, upon which he must rest his whole defence.

But while we approve of the advantages resulting from this mode of pleading, we ought to state the only inconvenience to which it

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is liable—which may possibly lead the way to additional improvements. In special pleadings the case is brought to a single point, so that the parties know to what the proof is confined, and the plaintiff particularly knows the ground on which the defendant rests his defence, and of course may be prepared to counteract his proof; but on the general plea, the plaintiff cannot tell what is the point of defence on which the defendant relies, until he comes to the exhibition of his proof in the course of the trial, when the plaintiff may be surprised by some unexpected proof, which he might have counteracted had he known in due season, that the defendant intended to avail himself of such special matter: but as the cause comes on trial before he discovers it he has no opportunity to adduce his proof. If some rule could be adopted requiring the defendant in all cases, where under a general plea he did not depend on the denial of the facts in the declaration, but rested his defence upon some special matters, he should inform the plaintiff by stating in writing the special points of his defence, and to which his proof should be confined in the trial: this perhaps might prevent the plaintiff from being surprised, and furnish the defendant the same latitude of defence which he is at present allowed. But as the law now stands, any inconvenience to the party by not knowing the point of defence, may be remedied by granting a new trial.

The expressions in the statute are so definite and certain, that it is unnecessary to consider very particularly what matters must be pleaded specially, and what may be given in evidence. <sup>a</sup> The superior court have determined that upon the plea of non est factum to a bond, the defendant may give in evidence, duress; for they said, under that plea any thing might be given in evidence, that went to the avoidance of the bond. So in an action of trespass, the defendant under the general issue of not guilty, may give a licence from the plaintiff in evidence: for it is a matter antecedent to the trespass, and if true, the defendant never was guilty, and tho the licence is an act of the plaintiff by which the defendant is saved: yet if it be proved, the defendant never has been a trespasser. The acts of the plaintiff which the statute requires to be pleaded specially, are *ex post facto*: and always suppose the defendant to have been once guilty

<sup>a</sup> Kirb. Rep. 332.

guilty, but that he is saved, and the plaintiff estopped by some subsequent matter or transaction.

• Under the plea of full payment on a note, the defendant cannot give in evidence the payment of any collateral article ; but must plead it specially by way of accord and satisfaction. It has been determined, that upon a plea of full payment to an action on a note of hand, the defendant may give in evidence a receipt for the money paid, as well as any other acknowledgment of the plaintiff, that money has been paid to him by the defendant. In an action upon a note of hand, the defendant under the plea that he did not assume and promise, cannot give full payment in evidence ; for this contradicts his plea ; but in an action on an implied promise, the defendant may give payment in evidence, under the general plea ; for this removes the ground on which the promise rested, and if payment has been made, the law implies no promise.

In an action of slander, the defendant under the plea of not guilty, may give in evidence the truth of the words spoken by way of justification. At the common law, the defendant under the general plea of non est factum, not his deed, might give in evidence, interlineation, rasure, or any alteration of the deed by which it was destroyed. But tho the defendant is permitted to plead generally, and prove specially yet he is not obliged to do it, and he may plead the special matter, in the same manner as before the statute.

2. Of special Pleas in Bar, and Pleas that amount to the General Issue. Every plea in bar, goes upon the ground of a confession and avoidance of the facts stated in the declaration. When the defendant concedes, that the facts alledged in the declaration are true, but has some special matter to avoid their operation, he may not plead generally, but must confess the facts and by pleading the special matter, avoid them. The defendant when he pleads specially, may either confess all the facts stated in the declaration, and then by some special matter, avoid their operation, or he may confess part, and then plead some special matter, not directly repugnant to the fact which he does not confess, but which will operate in avoidance of it. Therefore when the defendant owns all the facts stated in the declaration to be true, and sufficient to maintain

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• Church, vs. Rhodes, Sup. C. 1784.

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the action, he has nothing to do but to suffer a default. If he owns them to be true, and conceives them to be insufficient, he must demur; if he denies them all, he may plead the general issue; if he owns part and denies part, he must traverse what he denies; if he owns the facts to be true, and has some special matter to avoid them, he must plead that matter specially, unless it can be given in evidence under the general issue; if he owns part, and has some special matter to avoid what he does not own, he may plead that specially in avoidance. For the general rule to confess and avoid, does not imply that you must confess the whole facts, and avoid them by some special matter, but that you may confess part, and then by some special matter avoid the rest.

The rule of pleading that you must confess and avoid, clearly demonstrates that you cannot plead a matter in bar, which contains nothing but a denial of the whole declaration, because that amounts only to the general issue; and it is improper to plead those facts specially, which must depend upon the proof which will necessarily be adduced in the trial of the case upon the general issue. If a matter however be pleaded, which amounts to the general issue, yet if there be special matter of justification joined in the same plea, it will be good.

Where the special matter pleaded in bar does not operate by the way of denial merely, but as an avoidance, acknowledging the facts to be sufficient, unless avoided by such special matter as is pleaded, such plea is good. If in an action of trespass, the defendant plead that the property of the thing in question was in himself, it is no good plea: because it amounts to a denial of the facts stated in the declaration; for the right of property is the gist of the action—but a plea that the plaintiff gave the thing to the defendant, is good. So in an action of disseisin, if the defendant pleads that the title to the lands in question, is in himself, it amounts to the general issue, for it directly calls in question, and denies the title of the plaintiff; but where the defendant discloses some special facts and confesses that the title is in the plaintiff, unless avoided by these facts specially pleaded, then such plea is good; because he does not expressly deny the facts, but avoids them by others, which he avers are true. This  
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however contradicts the usual averments in the declaration, that the plaintiff is well seized of the premises, yet it is not a mere denial, because it discloses facts which avoids the title, by which the plaintiff claims if they are true, and if they are not true, then it admits the title of the plaintiff.

It is therefore not just to say, that every special plea that does not acknowledge the material facts stated in the declaration to be true, is ill; but every plea which does not avoid the material facts in the declaration, is ill.—By such an admission of facts under a special plea, it becomes unnecessary to enquire into the truth of the facts in the declaration. The enquiry will be wholly confined to the matters contained in the plea: and if they are found not to be true, the facts in the declaration are admitted to be true, and the plaintiff will be entitled to judgment.

In illustrating the doctrine respecting pleas in bar which amounted to the general issue, we have been obliged pretty fully to consider what is a proper plea in bar. In the cases excepted in the statute respecting pleas, which are where the special matter arises from some act done by the plaintiff himself, it is necessary, that the matter be pleaded specially, for it cannot be given in evidence on the general issue.

Pleas in bar, are as various as the circumstances of particular cases require: they all depend upon one general principle. They must confess and avoid—according to the nature of the action; the defendant may plead in bar a release, accord and satisfaction, award of arbitrators, nonage of the defendant, performance of conditions, full payment, tender, statute of frauds and perjuries, statutes of limitation, duress, and usury. *a* An estoppel is likewise a special plea, which happens where a man has done some act, or executed some deed which precludes him from averring any thing to the contrary. A man is estopped from contradicting a record. A justification is a special plea, as in actions of trespass, where the defendant justifies the doing of the thing complained of, in right of some office which warranted him so to do. *b* Every plea in bar should be proper, pertinent, and adapted to the action, according to the nature and quality of it. *c* It must be good in substance, so that

*a* Co. Lit. 252. *b* Co. Lit. 285, 303. *c* 4 Bac. Abr. 86.

that the essence or gift of the plea should fully answer the declaration, and if found for the defendant, must entitle him to a judgment in his favour according to law. *c* The plea must be single containing one matter only, for duplicity produces confusion and uncertainty. It must be direct and positive, and not argumentative. It must have convenient certainty of time, place, and persons. *b* It must answer the plaintiff's allegations in every material point, and it must be so pleaded as to be capable of traverse and trial.

*e* In special pleas, things must be pleaded according to their operation in law; and so they must in every stage of pleading. *d* If either party alledge more than is necessary by which they introduce new matter, repugnant and contradictory to what went before in any point not material, this will not vitiate the pleadings; for what is material, is not vitiated by what is immaterial; and what is repugnant or redundant, shall be rejected after verdict; but if the repugnant part be material, it is not aided by verdict; if however the verdict be given on a material point, the repugnant part may be released.

*e* In pleading, the parties must avoid negatives pregnant, and affirmatives pregnant with a negative. Negative pregnant, is where a negative supposes or implies an affirmative. As where it is pleaded that the thing was not given by deed, it implies a gift by parol. An affirmative pregnant with a negative, is where the affirmative implies a negative.

*f* Whenever the plaintiff declares upon a deed, or the defendant pleads a deed it must regularly be with a profert, so that the adverse party may hear it read, without which he is not bound to answer. The reason why deeds must be shewn, or produced to the court is, because it is the proper office of the court to judge of the sufficiency of them, to see that they are duly executed, that there has been no rasure, interlineation, or alteration, and whether they are absolute, conditional, or revokeable.

In all cases where a thing cannot be demanded, but by deed, the deed must be produced, but where the deed is only an inducement to the action, it need not be pleaded with a profert. *g* Oyer of a deed

*a* Co. Lit. 303. *b* Cro. Eliz. 268. *c* Co. Lit. 193. *d* Idem, 303.  
*e* Idem, 126. *f* 4 Bac. Abr. 109. *g* 4 Bac. Abr. 113.

deed, or any writing, is always to be had by him who is to be charged by it; and he who pleads, or declares upon it, must produce the deed or writing.

A former recovery may be pleaded in bar of an action, for it is a maxim of law, that no one shall be twice vexed with a suit for the same matter, cause and thing. But this rule is to be taken under certain restrictions. If the writ abates (when the trial is not upon an issue in fact) for some defect in form, or service, this will be no bar to another suit. So if the declaration be ill in point of form, or if it fails by reason of some mistake, this will be no bar to an action well brought. If the plaintiff misconceives his action and fails, this is no bar to a proper action. But where a judgment has been rendered upon the merits of a cause, in favour of either party, it is a bar to any future action. When the title of land has been tried upon an action of disseisin, it is conclusive; but when the title has been incidentally tried in an action of trespass, it is no bar to a future action that respects the title.

The statute of frauds and perjuries and statutes of limitations, may be pleaded in bar to actions. The statute to prevent frauds and perjuries, enacts <sup>b</sup> that no suit in law or equity, shall be brought or maintained upon any contract or agreement whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be made in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. That no suit in law or equity shall be brought or maintained upon any contract or agreement, not required to be reduced to writing as aforesaid, but within three years next after entering into and making the same.

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• It has been decided, that the plaintiff in an action grounded upon a contract, which the statute requires to be in writing, need not aver in his declaration, that the contract was reduced to writing—but if he can produce the written contract on trial it will be sufficient. The defendant may plead this statute in bar to such action with an averment that such contract was not reduced to writing, and then the plaintiff must reply a contract in writing, otherwise he fails of his action. But the defendant may plead the general issue, and on trial may object to the admission of parol proof to support a contract required to be in writing; and if he cannot produce the contract in writing, the court may exclude all parol proof, and the issue of course must be decided against him. In either of those ways, the question may be brought before the court, to decide whether the contract declared on comes within the statute, so as to be required to be in writing. Where a contract contains sundry things to be done, if the substance of the contract be within the statute, no action can be maintained upon it, tho some parts of the contract are not within the statute.

Whenever the parties in the course of pleadings, admit the existence of the contract, it shall be binding, tho not reduced to writing, and such admission will take it out of the statute. • In all cases of parol executory agreements, a part execution will take them out of the statute: for the object of the statute is to prevent perjury, and fraud; and if the agreement be in part executed, there is such certainty respecting the proof, that the danger of perjury is removed, and if one party has performed his part of the contract, it will be the greatest encouragement to fraud, to permit the other party to be excused.

A promise to marry, is not considered within the statute. But a promise to do any thing on the consideration of marriage, is clearly within the letter of the statute. • A parol promise to pay a certain sum of money upon the return of such a ship, which ship happened not to return within two years after the promise made, is not within the statute; for the ship might possibly have returned within the year, and the statute extends only to such promises, where by the express agreement of the parties, the thing itself is not to be performed within a year. H

• Raym. 450.

• 1 Bac. 74.

• S.lk. 280.

<sup>a</sup> If I say to a person, if you will sell goods to another, I will see that he pays you, it is within the statute—but if I say, I will see you paid, it is a direct promise for myself, and not within the statute. So if I recommend a person as of sufficient ability to pay, by which he gains credit and proves a bankrupt, I am liable upon the recommendation, because it is not within the statute. <sup>b</sup> In actions of assumpsit, attempts have been made to take advantage of the statute of frauds and perjuries, and limitation of actions, under a motion in arrest after verdict, for the plaintiff. But the court decided, that when the jury had found the promise, it was no reason to arrest the verdict because they had not sufficient evidence.

Statutes of limitation may be pleaded in bar of actions.— It is enacted by statute—that all book debts, that shall not within six years after contracting the same, be either sued for, balanced, or accounted for with the original debtor, his attorney, agent, or other lawful successor, or substitute, and an account or balance thereof witnessed by subscribing the debtor's or accountant's name to the creditor's book, such debt shall not be recoverable—with a proviso, that the time the debtor shall be out of this state, or the creditor absent from the United States, or legally incapable to sue in his own name, shall not be computed. The defendant is not bound to plead the statute of limitation to an action on book, but may take advantage of it under the general issue—for the defendant owes for nothing but articles delivered within the six years, and may object to the admission of evidence with respect to any article prior to the six years, antecedent to the date of the writ. but in actions founded on promises, the statute must be pleaded specially, for under the general issue of non assumpsit, he may not give the statute in evidence, for this acknowledges the promise, and contradicts his plea. He ought therefore in such cases to confess the contract and plead the statute in bar.

Under this statute it is clear that no recovery shall be had for a debt due antecedent to the six years : but then any articles delivered before that time may be applied in payment of any account that arises afterwards, by way of extinguishing a demand, but not to support a recovery.

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<sup>a</sup> 1 Bac. Abr. 75.    <sup>b</sup> Mott vs. Mason—Smith vs. Bradley. Sup. C. 1790.  
<sup>c</sup> Statutes, 327.

*a* The statute for the limitation of civil suits, enacts "that no suit, process, or action, shall be brought on any bond, bill, or note, under hand, given for the payment of any sum, or sums of money, not having any other condition, promise or contract therein, but within the space of seventeen years next after an action on the same shall accrue : provided that the time this state has or may be engaged in war, shall be expunged, and provided that persons over sea, or legally incapable to bring their action for their debts above mentioned, may bring the same any time, within the four years after their coming from over sea or becoming legally capable to bring an action. That no action of trespass, nor of the case for slander and defamation, shall be brought but within three years after the facts are done or the cause of action doth arise. That no suit or action, either in law or equity, shall be brought or maintained against any sheriff, sheriff's deputy, constable, or any other person or persons whatever, for any neglect or default of such sheriff, sheriff's deputy, or constable in their office and duty, but within two years after the right of action shall accrue."

The construction of this statute respecting the limitation of seventeen years, and the saving clauses has been settled by the supreme court of errors, in the case of *Brattle vs. Gustin*,—which was as follows. *b* Brattle being administrator on the estate of William Brattle deceased, brought his action of debt against Gustin, declaring upon a bond given to the deceased, dated the 5th day of June 1758. The statute of limitations was pleaded in bar and the following replication was made by the plaintiff. That in the month of March 1776, the said William Brattle went over sea to Halifax, in the province of Nova Scotia, and there remained till the 26th day of October 1776, when he died intestate, and that administration was not granted on his estate till the 9th day of October 1784, when the plaintiff became legally capable ; and that this action was commenced within four years from said 9th day of October, and that the late war commenced on the 19th day of April 1775, and terminated the 4th day of May 1783, and that within seventeen years of the bringing the action exclusive of the war, there was a payment made, and a balance acknowledged to be due, which was subscribed to by both parties on the back of the bond.

*a* Statutes, 128, 303.

*b* Kirb. Rep. 299.

bond, in these words, March 14th, 1764, due on this bond one hundred forty-five pounds four shillings and sixpence.

William Brattle,  
Thomas Guftin.

On demurrer the three following points were made. 1. That the obligee was over sea, and so within the meaning of the statute. 2. That the administrator was legally incapable to bring his action, until after letters of administration were granted. 3. That an acknowledgment of the debt within seventeen years, saved the bond out of the statute.

Judgment was rendered by the county court in favour of the plaintiff; which was reversed by the superior court, and on writ of error to the supreme court of errors, judgment was reversed for the following reasons. 1. The acknowledgment of the debt due on the bond, and endorsed thereon, and subscribed by the obligee and Guftin, one of the obligors on the 14th of March 1764, places the demand on such ground as that the seventeen years limitation is to be considered as running from that time only. But— 2. admitting the limitation to run from the date of the bond, still that part of the war intervening between the date of the bond, and the expiration of seventeen years, viz. from the 19th of April, 1775, to the 15th of June, 1783, is not to be considered as part of the seventeen years limitation, but according to the statute, is to be expunged therefrom, so that even in that case, the claim was not barred before the deceased William Brattle went to Halifax, which was on the 10th day of April, 1776,—and died there during the war.

3. The said William Brattle going to Halifax, is in judgment of law going beyond sea. Halifax being part of the dominion of a foreign power, and this circumstance brings the case within the reasons, on which the law is supposed to be founded.

4. The deceased William Brattle dying at Halifax, without having returned to New-England, and no administrator being appointed till the 9th of October, 1784, the legal incapacity to bring an action, is to be considered as continuing till that appointment, and

the action on the bond being commenced in four years from the removal of such incapacity, the right of action is considered as thereby saved by the statute. This construction of the statute has since been confirmed by the superior court, in the case of *Gates vs. Brattle*, dependant on similar facts, and these points are now to be considered as settled.

2. In the construction of that part of the statute of limitation which respects suits against sheriffs and constables, for any neglect or default in their office, it has been determined that tho an action will not lie against them directly for any default, or upon a receipt for an execution, but within the two years, yet where there has been an actual collection of money on an execution, the creditor may at any time after the two years bring his action of implied promise against such sheriff or constable, for money had and received, and if on trial he can prove the actual collection and reception of the money, it will support the action, and that the statute is no bar:—but as the officer is not bound to carry the money to the creditor, a special demand must be made.

Special pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true, in the common form, “and this he is ready to verify.” This is not necessary in pleas of the general issue, those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

3. Of traverse. *b* A traverse is defined to be the denial of some material point or fact alledged in the pleadings, and which if properly taken, closes the issue. It may be taken to the declaration, bar, or replication. If it be properly taken to the declaration, it destroys the plaintiff’s right of action. If to the plea in bar, it destroys what is said in avoidance of the action; and if to the replication, what is said in avoidance of the bar. It is usual to prepare the way for a traverse, by alledging some facts by way of justification, which are called an inducement to the traverse, and the form of introducing the traverse, is by the words “without that.”

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*a* Church vs. Clark, Sup. C. 1797. *b* Co. Lit. 282. *4* Bac. Abr. 67.

When the defendant means to confess part of the declaration, and traverse part, he commences his plea in the form of a plea in bar ; then by way of justification, and as an inducement to the traverse, sets up some facts directly repugnant to certain facts which he has not confessed, and then closes with a traverse of the facts which he contests. Whenever a person proposes such a plea, he may as well plead the general issue, for he must traverse such material parts of the declaration, as will destroy the action, or it will be immaterial ; and he can take advantage of every matter under the general issue, as well as he can under such traverse of any part of the declaration.

\* It has been laid down as a general rule, that nothing can be an inducement to a traverse, but what is traversable : but it appears to me, that the matter of inducement is of no consequence, and can never be traversed : for whenever a fact that is well pleaded, so as to be traversable, is not traversed, it is conceded to be true : and when the issue is tried, the facts that are traversed are to be proved and not the inducement to the traverse. It is inconsistent to suppose that the inducement to a traverse must contain facts that are traversable, when it is conceded that the party traversing does not rely upon the inducement, but upon the traverse. The parties cannot demur to an inducement for its insufficiency, because if the traverse be taken to a material point, it is good. Nor can they traverse the inducement, because that would be a traverse upon a traverse. In all instances where the traverse is properly taken, the opposite party must affirm over the same facts. If we cannot demur to nor traverse an inducement, it is clear that it has no legal effect, and if the party is bound to affirm over a material fact when traversed, it is certain that he does not admit the truth of the facts stated in the inducement. Upon these principles, I consider the inducement to a traverse, as mere form for the purpose of introducing the traverse itself, and whenever a party intends to deny a fact material, he may as well do it by a traverse without as with an inducement.

I shall now explain the general principles respecting traverse.  
 b Whenever a matter is expressly pleaded in the affirmative, and is expressly

a Cro. Car. 336.    b Leon. 32.    c Cro. Eliz. 755.

expressly negated by the other party, a traverse is unnecessary, because a sufficient issue is joined : but this must be understood not where there is a mere contradiction ;—there must be an apt issue upon the affirmative and negative : for where the death of a man is alleged by one, and his life by the other party, tho there be an express contradiction, yet no issue is formed, and therefore there must be a traverse. <sup>a</sup> In all cases wherever there is a matter alleged by the defendant, which is directly contrary to the matter set forth in the declaration, there must be a traverse of the matter set forth in the declaration.

The same rule applies to replications and rejoinders ; tho it is said, that the other party may waive the advantage, or demur. If the defendant pleads a tendry, the plaintiff may reply some repugnant fact, and traverse the tendry. Indeed the only real use and necessity there is for a traverse, is to deny the facts stated in pleas and replications : for if the defendant means to deny any part of the declaration, he may plead the general issue—if he means to avoid it by some special matter, then that must be pleaded. If the plaintiff contests the truth of the matter pleaded in avoidance, he has no way to do it, but by a traverse in his replication. <sup>b</sup> A traverse must be taken to some material point alleged by the adverse party, and if found for him that takes it, absolutely destroys the adverse party's right ; by shewing that he hath none in manner and form, as has been alleged.

<sup>c</sup> It is laid down as a general rule, that there cannot be a traverse upon a traverse : because in all the pleadings when a traverse is taken to a material point, the issue is closed, and therefore there cannot be a traverse upon a traverse. If the traverse be to the declaration, it destroys the right of action ; if to the bar, what was said in avoidance, and so on ; and consequently a subsequent traverse would be insignificant : because when a material traverse is taken, the rest stands confessed : for it is a rule that whatever is traversable, and not traversed, is admitted.

<sup>d</sup> It is a rule that regularly, whenever a traverse is taken apt and material to the plaintiff's title, the plaintiff is bound to it, and cannot force the defendant to accept another traverse tendered by

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<sup>a</sup> 1 'Id. 301   <sup>b</sup> 6 Cr. Rep. 24. a   <sup>c</sup> Co. Lit. 28a   <sup>d</sup> Hob. 104.

him. The parties cannot confess and avoid, and then traverse the same fact; for it is inconsistent to admit a confession and denial of the same fact in the same plea. Therefore when the defendant pleads a release from a bond, he cannot be admitted to deny the execution of it.

\* The traverse is regularly to be taken to the most material point alleged by the other party, and not to be multifarious, but to a single point: but tho the issue must be taken on a single point, it is not necessary that this single point consist of a single fact. When either party takes a traverse, he closes with a verification, *this he is ready to verify*, and prays judgment: and the other party must affirm over the facts traversed, and tender an issue, *and thereof puts himself on the country*.

4. Of the Replication, Rejoinder, and Surrejoinder. The replication is an answer made by the plaintiff to the plea of the defendant. If he denies the facts, he will traverse them. If the defendant has traversed any material point in the declaration, he will affirm it over in the replication. If the facts set up in the plea are such that the plaintiff can avoid them, he may reply any special matter by way of avoidance. If the defendant pleads a tendry, the plaintiff may confess and reply in avoidance, a special demand, subsequent to the tendry.

The rejoinder is the answer of the defendant to the replication of the plaintiff. If the replication contains a traverse, the rejoinder affirms the facts—If it contain some special matter by way of avoidance, the defendant may in his rejoinder traverse it, or he may allege any special matter by way of avoidance, that is not inconsistent with his plea. As where there is a plea of tendry, a replication of a subsequent demand and refusal—the rejoinder may avoid such demand by alleging an offer to pay the money demanded. The surrejoinder is an answer by the plaintiff to the rejoinder of the defendant, and may contain a traverse or affirmance as the case may require.

There is also a rebutter, and a surrebutter, to which however the pleadings are rarely extended.



In any stage of the pleadings, where either of the parties advance a new matter, he avers it to be true, "*and this he is ready to verify*;" which is the usual way of closing an inducement to a traverse, where either party traverses, he closes by praying judgment, and the party affirming the facts traversed, tenders the issue; but by the English practice, the party traversing offers the issue, and this is the preferable method: for where any point that has been alledged is traversed, there need be no affirmance, for there is an express affirmation and denial, which completely forms the issue. *a* But if either side plead a special negative plea, not traversing any thing before alledged, but disclosing some new negative matter, as where the suit is upon a bond conditioned to perform an award, and the defendant pleads that no award was made, he tenders no issue upon the plea, because it does not appear whether the fact will be disputed, the plaintiff not having yet pleaded an award. If the plaintiff replies a specific award, then the defendant may traverse it, the plaintiff affirm it, and an issue will be closed.

5. *Of immaterial and informal Issues.* *b* An immaterial issue is where, what is materially alledged in the pleadings is not traversed; but an issue is taken on such point as is not material, and will not determine the merits of the cause. *c* In debt on a bond, conditioned for the payment of sixty pounds on the 25th day of June, the defendant pleads payment on the 20th day of June, according to the condition, on which issue is joined, and a verdict that the defendant did not pay on the 20th day of June, but the plaintiff shall not have judgment, for the issue was different from the condition of the bond, and the defendant might have paid on the 25th day, it was therefore immaterial whether he paid it on the 20th, and of course the issue was immaterial.

A verdict cannot help an immaterial issue, because what is alledged in the pleadings, is not put in issue, or if it be it is not decisive between the parties, and therefore, there can be no foundation for a judgment. *d* Where the parties put an immaterial issue to the court, let the proof be as it may, they will decide the issue to be immaterial, and instead of ordering a replender, they will render judgment upon the facts which stand confessed in the pleadings, by the parties having taken an immaterial issue. *Au*

*a* 3 Black. 513, *b* Carth. 371. *c* Cro. Jac. 435. *d* Bayly, vs. Gordon, Sup. C. 1794.

An informal issue is where the traverse is not taken in the right manner : but this shall be aided by verdict, because the material facts are found, and the court can render judgment. In an action of covenant, the plaintiff assigns a breach that the defendant was not seized in fee, and so had broken his covenant. The defendant pleaded that he had not broken his covenant : on which, issue was joined, and verdict for the plaintiff. This is an informal issue, but the breaking of the covenant is found, and therefore judgment shall be rendered for the plaintiff.

6. Of Departure in Pleading. *a* A departure in pleading is, when the second plea contains matter not pursuant to the former, and which does not fortify the same ; as where the rejoinder contains matter repugnant to the bar, and does not fortify the same, it is a departure. The replication should support the declaration, and the rejoinder support the plea, without departing from the facts stated in them. As in the case of pleading, no award in action of debt, upon an arbitration bond, to which the plaintiff replies, setting forth an award, the defendant cannot rejoin, that he has performed the award ; for this would be an entire departure from the original plea, which alledged that no such award was made ; he must therefore traverse the award, or demur to it for insufficiency. *b* But where a man shews any thing which he could not have shewn at first, it shall never be reckoned a departure. So where he fortifies his plea in the same manner that he pleaded it ; but if he fortifies in a different manner it will be a departure. *c* As if one pleads a statute, the other says it is repealed, he may reply that it is revived by another, for this fortifies the first matter.

*d* But if a man pleads performance of covenants, the plaintiff replies that he did not do such an act according to the covenant : the defendant says he offered to do it, and the plaintiff refused : this is a departure ; for it is one thing to do an act, and another that he offered to do it and the other party refused.

*e* In many actions, the plaintiff who has stated in the declaration an injury in general terms, may in his replication, if the defendant puts in an evasive plea, reduce the general wrong to greater particularity, and certainty. He may make what is called a new assignment ; which is assigning the injury anew, and in a manner consistent

*a* Co. Lit. 304. *b* Yelv. 14. Cro. Car. 257. *c* Lev. 81. *d* Co. Lit. 304. *e* 3 Black. 311.

consistent with his declaration, by which he specifies the circumstances of it, so as to identify and ascertain it. As if the plaintiff in trespass declares upon the breach of his close in dale, and the defendant in his plea alleges that the place where the injury is said to have happened, is a certain close or pasture, which descended to him from his father, and so is his own freehold; the plaintiff may reply and assign another close in dale, as the place of the injury, and specify the abutments and boundaries.

7. Of Duplicity in pleading. *a* Duplicity in pleading is when a plea contains two or more distinct matters to one and the same thing, and to which distinct answers are required. This the law will not allow—but the rule extends only to pleas to the action, and not to dilatory pleas; for the defendant may plead several distinct matters in abatement. In an action of debt, the defendant cannot plead tender at the day and a release; because there are distinct matters requiring different answers, and either are sufficient to avoid the action. *b* For the reasons why duplicity in pleading is a fault, are, because the party is as effectually barred by a single point as by a number; it is therefore unnecessary to put him upon litigating a number. The party is supposed to know his own strength, and the material point in the case. He ought therefore to chuse his strongest point of defence, and adhere to it. For every plea ought to be simple, entire, connected, and confined to a single point: it must never be entangled with a variety of distinct and independent answers to the same matter, which must require as many different replies, and introduce a multitude of issues upon one and the same dispute: which would often embarrass the court and jury and greatly enhance the expense of the parties.

*c* Where a man confesses and avoids, and likewise traverses the same point, this is in the nature of a double plea, and ill. *d* If a man pleads two things, when he is compellable to shew both, this does not make his plea double. *e* In all cases of duplicity in pleading, the party must demur specially on account of such duplicity, if he means to take advantage of it, and point out in particular wherein the duplicity consists; and if he does not he is considered as waving any advantage. *f* When the parties plead regularly without any informal, or immaterial issues, and are not guilty of a departure

*a* Co. Lit. 304. *b* 4 Bac. Abr. 279. *c* 2 Vent. 271. *d* Plow. 194.  
*e* Ld. Raym. 332. *f* 3 Black. Com. 313. *Starr vs. Menshaw*, Supr. C. 1791.

departure or duplicity, and in the course of the pleadings come to a single point, which is expressly affirmed on one side, and denied on the other, they are then said to be at issue : all their evidence and debates are confined to a single point, which must be determined by some tribunal prescribed by law.

8. *Of Demurrer.* A demurrer is denominated an issue upon matter of law. It confesses the facts to be true, as pleaded by the opposite party ; but denies that any injury is done upon the construction and operation of law, arising out of the facts, or where a demurrer is taken to a plea in bar, it denies that the facts stated in the avoidance, are sufficient to make out an excuse. A demurrer may be taken in any stage of the pleadings, where the matter pleaded is defective in point of form, or insufficient in substance. If the declaration contain not such allegations of facts, as constitute an injury, a demurrer may be taken for insufficiency. If the defendant plead such plea as will not justify him, or if he pleads it in such manner as the rules of the law will not admit, the plaintiff may demur to it, and the same may be done by either party in any part of the pleadings. For the general rule is, that whenever you deny the fact, you must traverse : but when they are insufficient in the law to substantiate the point for which they are pleaded, you must demur.

Pleas that amount to the general issue, that are informal, or immaterial, and departure, and duplicity in pleading are to be taken advantage of under a demurrer.

6 A demurrer cannot be taken to the same fact that is traversed, but in some cases the parties may demur to part of the facts stated in the declaration, or plea, and traverse the rest. So that there may be two independent issues : a demurrer, which is an issue in law determinable by the court : and an issue in fact, determinable by the jury : but this must be understood as relative to distinct parts of the same declaration, or plea. In which cases, it is the ordinary practice of the court to try the demurrer first, but they have a discretionary power to try the issue in fact first. But the party may not demur to the same fact that he traverses, nor demur and

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plead

\* 4 Bac. Abr. 129.

\* Co. Lit. 11, 72. 4 Bac. Abr. 129.

plead to issue to the same declaration, yet when there are several counts, he may demur to one and plead to another.

*a* It is a general and uncontested rule that a demurrer admits all facts that are sufficiently pleaded. *b* Where a judgment is rendered upon demurrer it is as conclusive and as binding as where judgment is rendered on a verdict. Where the pleadings terminate in a demurrer the court will go back to the first defect, to render judgment, for they have a right to look through the whole pleadings, and he who first pleads insufficient matter must fail in his action. Thus if an insufficient, or defective plea in bar is given, and a demurrer taken; yet if the declaration be insufficient, the court may judge such plea to be sufficient, for the defective in itself, yet is a sufficient answer to an insufficient declaration: and so in every other stage of the pleadings.

*c* A demurrer is said to be general or special: general where no particular cause is alledged, special where the particular thing objected to, is pointed out and insisted upon as the cause of the demurrer. A general demurrer confesses all facts well pleaded, and under a special demurrer the party can take no advantage of any other matter of form than what is expressed in the demurrer: but he may of any other matter of substance. *d* The established distinction is that matters of substance, that is, the omission of such material things as are necessary to shew a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer: but matters of form must be specially alledged and assigned as causes of demurrer; for two things are required in pleading, that the matter be sufficient, and that it be deduced and expressed according to the forms of law.

The courts in this state have adjudged, that duplicity in pleading can be taken advantage of only under a special demurrer: but in other respects, I believe they have not rigidly adhered to the principles of common law.

It is declared by statute, that no defendant shall be admitted to demur to a declaration, after he has pleaded to issue, and a judgment has been rendered thereon by any court. It is a rule that what is apparent to the court and appears from necessary implication

*a* Co. Lit. 72. *b* 4 Bac. Abr. 134. *c* Co. Lit. 72. *d* 4 Bac. Abr. 134.  
223. *d* 10 Co. 12.

tion in the record need not be averred. That every man's plea shall be taken most strongly against himself ; for every body is supposed to make the best of his own case. That what the parties have agreed in pleading shall be admitted, tho the jury find otherwise. That when a man would recover a thing from another, it is not enough for him to destroy such person's title, but he must prove his own to be good and legal : for in equal right, the best is the condition of the possessor.

9. Of altering and amending Pleas. • The statute law has made provision that whenever any party supposes that he has missed his plea, whether the general issue or special plea, which would have saved him in his just cause, he shall have liberty to alter his plea and the opposite party shall have a reasonable time assigned him for making answer thereunto ; and if the new plea be found insufficient, for the justifying him that made it, reasonable satisfaction shall be awarded by the court before which the trial is, to the other party for the greater delay, which is made thereby ; according to the interest of money, rent of lands, or improvement of any other thing recovered by the suit.

This statute seems to be peremptory that the defendant when he supposes he has missed his plea shall have the liberty to alter the same, and it leaves but little discretionary power with the court. But courts have usually exercised a discretion in denying liberty to alter pleas, where it appeared to be calculated to delay, or evade justice : where it appears that the party thinks that he has missed his plea, and moves for liberty to alter with a view as he conceives, to have a fair trial of his cause, a court may not deny him liberty. Instances have happened where this liberty has been granted after a trial to the jury had commenced. In an action on note the defendant pleaded that he did not assume and promise, and offered to give full payment in evidence to the jury, which being refused by the court, he moved for liberty to alter his plea to full payment, which was granted by the court : because it came within the statute, which had limited no time, and because it might prevent the necessity of an application for a new trial. After a demurrer has been argued, the court have suffered the plea to be altered.

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Greatest inconveniences were experienced in the administration of justice, for want of a statute to authorise amendments in legal proceedings and especially of declarations. As we had admitted the practice of issuing the writ and declaration at the same time, it frequently occurred in the hurry of business, that declarations were drawn so defective as to be ill on demurrer. The consequence was that the parties were frequently delayed in their cause and subjected to the expense of commencing new suits for some trifling defect or informality in the declaration, because there was no statute to authorise an amendment. The inconveniences resulting from this defect in our legal system gave birth to a statute authorising amendments in proceedings at law and in equity,— which enacts, that the several courts of law, and equity in any action, may at any time permit the parties respectively to amend any defects, mistakes or informality, in the writ, declaration, pleadings, or other parts of the record in civil causes, pending before them, on the payment of lawful costs to the other party ; at the discretion of the court in which the same shall be pending ; and in case of any amendment of the declaration, the court shall grant the defendant a reasonable time to make answer thereto.

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#### CHAPTER TWENTIETH.

#### OF TRIAL.

**W**HEN the pleadings terminate in an issue of law, it is the province of the judges to decide it. Thus all demurrers to declarations, or any part of the pleadings, which bring up a question of law to be determined upon the facts conceded to by the parties, belong to the judges to decide without the intervention of a jury. So the court has cognizance of all motions made by the parties respecting bonds for prosecution, special bail,oyer, pleadings—for the delay, or trial of causes. For these purposes they may not only establish general regulations to facilitate and accelerate justice, but they may make special orders respecting particular cases, as circumstances may require. They must determine when the plaintiff ought to procure bonds for prosecution, by reason of his inability to pay cost ; they must determine upon the sufficiency of the person

person offered as bail ; they may direct the time in which oyer shall be demanded, and given ; and when the parties shall plead, and reply. They may assign the time when causes shall come to trial, and they have the power to delay them for such time, during the term, and from term to term, as occasion shall require. In respect to this branch of their jurisdiction, it is impossible to lay down any general rules, for their power is bounded only by discretion, and this must be guided by the circumstances of particular cases. With regard to the delay of causes, it may be observed, that it ought only to be admitted, when it appears that substantial justice cannot be done, for want of due preparation within the power of the requesting party to make, and that he is not faulty because such preparation has not been made : but for frivolous excuses, or where it appears to be the design of a party to procure unnecessary delays, courts should be cautious about indulging them, and hasten the trial with all the expedition consistent with fairness and justice.

Motion for the delay of causes frequently arise from the absence of material witnesses. In this respect, difficulties sometimes arise about ascertaining the fact. Our courts have never adopted the practice of admitting the affidavits of the party in such cases. The consequence is, that where other proof cannot be obtained, which will rarely happen, there can be no evidence, but the suggestion, and assertion of the party himself. In respect of the bare suggestion of the party, there is this inconvenience, that not being sworn to, courts cannot tell how far they may rely upon it. If the suggestion or the assertion of the party is not to be considered as evidence, there will be many instances in which he may sustain great injustice, because the fact rests solely in his knowledge : and if they are regarded in all cases, then it gives a fair opportunity to impose upon and deceive the court, by misrepresentation, as there is no oath required to check such a practice. It would therefore be advisable to adopt the practice of the courts of the United States, to require the affidavit of the parties to the truth of the facts, on which motions for a delay are grounded.

When an issue upon a matter of fact is regularly closed, it shall be tried by a jury ; unless the parties shall consent, and agree that it



it be tried by the court ; which they are impowered by law to do : and then the court shall proceed to try the case in the same manner, and upon the same principles, as a jury, and render judgment accordingly : This innovation was introduced in the revision of our statute law in the year, 1784, and is a very valuable, and important improvement. It is a considerable saving of expence.

There are many cases dependent on principles of law, which can be determined with much more propriety by the court, than by a jury ; and by putting the issue to the court, the points of law may be fairly settled, without obliging the parties to go thro the labyrinth of special pleadings, for the purpose of bringing the question of law, to be decided by the court. The parties have their election, and both must agree to try the issue by the court, so that no man can be compelled to give up his right to trial by jury : but he may assent to a trial by a different tribunal.

When an issue upon a matter of fact is to be tried, and both parties do not agree to put it to the judges, it must of course be tried by a jury of twelve men of the county.

It is not my design to enter into a laborious research concerning the origin and antiquity of trial by jury, nor to launch into the wide ocean of encomium upon this excellent and venerable institution. It will be but a repetition of observations, upon a topic, already worn thread-bare by the numerous writers who have handled it, in a manner correspondent to it's dignity and importance. It is sufficient to remark, that in this country the institution is co-*eval* with our government, that it is one of the most valuable privileges that can be enjoyed in civil society, and essential to the preservation of civil liberty. With these preliminary observations, I proceed to give an account of the mode of impanelling a jury, and of the mode of trial by jury.

• It is enacted by the statute for providing and regulating jurors in civil actions, that the civil authority, select-men, constables, and grand jurors in the several towns, shall upon penalty of fifty shillings, meet some time in the month of January, and chuse to serve as jurors, such number of able and judicious freeholders, as the sta-

tute

rate specifics, having a freehold estate rated in the list at fifty shillings or more. That their names shall be written by the town-clerk, and put into and locked in a box, provided for that purpose, and kept in the hands of the town-clerk : that some convenient time before the sitting of the superior and county courts, their clerks shall issue warrants directed to either of the constables, of such number of the several towns in the county, as may be necessary, commanding them to summon a sufficient number of freeholders to serve as jurors at such court : the jurors for the superior court to attend at twelve o'clock of the first day, and for the county court on the third day of the session.

The constable receiving such warrant, shall in the presence of the town-clerk, or in his absence of one of the select-men, draw out of the box the number he is directed to summon, without first seeing their names, and then shall summon the persons whose names are drawn ; but if any are absent or sick, or unavoidably hindered from attending court, their names may be returned, and new ones drawn, and the persons summoned. The constables must make timely return of their warrants, upon penalty of thirty shillings, and jurors must appear upon penalty of ten shillings.

When it happens that a sufficient number of jurors do not appear, or if by reason of challenges, or other cause, there be not a sufficient number to make up a panel, the court shall order the same to be filled up of the by-standers, *de talibus circumstantibus*, or for want thereof of any good and lawful freeholders of the county, whose names shall be returned by the sheriff, and when the sheriff is a party in the cause, or related to either of the parties, by the constable, or such officer, as the court shall appoint. This mode is excellently well calculated to obtain an impartial, and reputable jury, and precludes the possibility of the dangerous practice of packing a jury.

When jurors are thus returned, and before they are sworn, the parties have right to make their challenges.

a There are three causes for which jurors may be challenged. The want of Qualifications, Crimes and Partiality.

1. An

1. An alien born, an infant, or slave cannot be jurors, nor can a person who has not a freehold estate; <sup>a</sup> but this last can not be taken advantage of after verdict, in a motion in arrest.

2. <sup>b</sup> A juror who has been convicted of the crimes of treason, felony, perjury, forgery, or conspiracy, or if he has received judgment of the pillory, or any other infamous corporal punishment, may be challenged.

3. <sup>c</sup> A juror may be challenged for suspicion of bias, or partiality, which may be either a principal challenge, or a challenge to the favor. A principal challenge is where the cause assigned carries evident marks of suspicion either of malice, or favor. Thus where the juror is related to either of the parties within the ninth degree, has been an arbitrator on either side, has an interest in the cause, where there is an action depending between him and the party, has taken money for the verdict, has formerly been a juror in the same case, is the party's master, servant, steward, or attorney, or has published his opinion upon the particular case, these are principal causes of challenge, and if proved, cannot be over-ruled, but the juror must be dismissed.

It may be considered as a general rule, that where the party knows the ground of challenge, and does not make it, that he waives it, and cannot take advantage of it under a motion in arrest: but if he was ignorant of the cause of challenge, before the juror was sworn, he may take advantage of it in arrest. <sup>d</sup> As where two of the jurors before they were impanelled had formed, and declared opinions in favor of one of the parties, which was unknown to the other, the judgment was arrested, because the case had not had a fair and impartial trial: <sup>e</sup> but if such opinion appears to have been given under such circumstances as not to have influenced the verdict, it is no cause of arresting judgment. <sup>f</sup> It is a good exception to a juror upon a challenge, that he has once tried the same cause in a lower court: but as the party may receive information of the fact by the copies, it is no ground to arrest judgment after verdict, and he shall be considered as waving all advantage, because he did not take the challenge.

#### Challenges

<sup>a</sup> Kirb. Rep. 184. <sup>b</sup> 3 Black. Com. 363. <sup>c</sup> Ibid. <sup>d</sup> Kirb. Rep. 121. <sup>e</sup> Ibid. 61. <sup>f</sup> Ibid. 166.

<sup>a</sup> Challenges to the favour, are founded merely upon probable circumstances of suspicion : as particular friendship, or enmity to either of the parties : and where the court has reason to think, that there is such a bias, or prejudice upon the mind of the juror, as renders it probable that there will not be a candid and fair trial, they have a discretionary power to disqualify a juror : but they ought not to indulge the unreasonable and groundless suspicions of the parties. <sup>b</sup> An exception to a juror founded on a challenge to the favour, can not be taken under a motion in arrest. All challenges of jurors are decided by the court.

After the jury are regularly impanelled and sworn, the declaration and pleadings are read to them. The counsel on each side frequently state the material points on which they rely, for the purpose of opening the case to the jury, and shortening the trial. The party who takes the affirmative of the issue, and on whom the burden of proof lies, proceeds to adduce his witnesses, and is followed by the other party.

In treating of the several kinds of actions, I have hinted at the proof peculiar and necessary to each ; and in this place I have only to treat of the general nature, principles, and rules of evidence. Evidence is intended to furnish the minds of the triers with demonstration or conviction of the truth of the facts disputed by the parties, and put in issue. As it is impossible from the course of things, and the imperfection of human nature, to obtain complete demonstration of the truth of facts in all cases, it has become necessary to establish certain general rules, and adopt certain general principles, by which courts and jurors are to be governed, in forming their opinion with respect to the matters of fact that come before them for trial.

Evidence may be said to be of two kinds, written, and unwritten, or parol.

#### 1. Of written Evidence.

Written evidence consists of the records of the legislature, of the courts of law, and of the proceedings of all corporations, such as towns and societies, and all others, where their votes and acts are directed.

<sup>a</sup> 3 Black. Com. 362.    <sup>b</sup> Kirb. Rep. 152.

directed to be recorded. To prove records, it is not necessary to produce the original papers on which they are entered in court, because they are to be preserved in some place for general benefit, and if removed, would be exposed to loss; tho the producing of the original record would be good evidence. But they are regularly to be proved by an exemplification, or a copy certified, and attested by some proper officer; as the secretary in cases of the records of the legislature; the clerks in courts of law, and towns and societies: for tho the law requires in all cases the highest evidence the nature of the case is capable of, yet as it would be very inconvenient to produce the original records, it considers an exemplification to be proper evidence; and which is indeed as high evidence as the record itself.

A record cannot be substantiated, or contradicted by parol testimony; for every record imports in itself absolute verity, and no proof can be admitted to contravene it. Therefore where an issue is joined upon "no such record," the record, or rather an exemplification or attested copy is to be produced, and this is to be the only evidence upon which the court are to decide the fact. All exemplifications of records from any of the courts in any of the other States in the Union, must be under the seal of the court from whence they are taken. In all the public offices instituted by law in the United States, as the departments of the treasury, of state, and of war, in all the public offices instituted in this state, as the treasury and comptroller's office; and in all the public offices instituted in any of the rest of the United States, copies of those acts, and proceedings, of which regular entries are made in books kept for that purpose, certified by the proper officer, are evidence in courts of law.

Written evidence also consists of the private contracts of parties which they have reduced to writing.

Of the evidence of deeds. The general rule is, that where any thing is to be proved, the deed itself must be given in evidence, and not a copy of it; for tho copies of records are allowed, yet deeds being only private evidence, not confined to any place, and

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a Woodbridge vs. Grant, Sup. C. 1790. b Gilb. Evid. 95. 20 Co. 94.  
Morgan's Essays, 155.

in the custody of the party they must be produced : for the law requires the best evidence of which the nature of the thing is capable, and the deed is much better evidence than a copy ; for any rasure or interlineation which might vacate the deed, must appear in the deed itself, tho not in the copy, and the offering of copy carries a presumption that the deed is defective : and as deeds are in the custody of the party, they must be produced ; for a man cannot make his own fault in losing a deed, any part of his excuse. But where the party can prove that the deed is burned, lost or destroyed, he will be excused from producing it to the jury. If it can be proved that the deed was in such a house, and that the house was burned, or that the deed has been otherwise destroyed, without any neglect, or carelessness of the party, then the import of such deed may be given in evidence, and this will give reasonable grounds for the jury to find it. In this state the practice has been introduced that the plaintiff in such cases declares on his contract—and alleges that the writing has been burned, destroyed, or lost, or gone into the hands of the defendant without any fault on his part. If the defendant prays oyer, he must deny the loss : and if the plaintiff can prove it, he will not be bound to produce the writing, otherwise he must, or be non-suited. When the case comes on trial, he must prove the loss, or destruction of the writing without fault, and then he will be admitted to give in evidence a copy, properly proved ; or he may prove the contract, its contents and import, by parol, and this may be sufficient evidence for a jury to find a verdict. This is conformable to the English practice.

A copy of a deed which has been recorded, will be good evidence where the original is lost. \* So a copy of a deed is good evidence where the original is in the hands of the defendant ; but this copy must be proved by witnesses that compared it. † An authenticated copy of a deed from the record, is always admissible evidence, and its weight must be left with the jury. All written contracts, whether sealed, or not, which are the ground of an action for the recovery of a debt or damages, must be laid with a protest, and must be produced on trial in evidence, unless burned, lost or destroyed, as has been mentioned. The law not only requires the production of deeds,

\* 1 Mod. 266. † Sherwood vs. Hubbel, Sup. C. 1793.

deeds, and written contracts in evidence, but it also requires proof of their execution, excepting in cases of deeds of more than thirty years standing which are called *ancient*, and which need not be proved, if they have been attested by *possession*. unless there appear some rasure or interlineation, when they ought to be proved.

But generally speaking, where the point is contested, the execution, and delivery of all written contracts, are to be proved by *parol* testimony. This may be proved either by the testimony of subscribing witnesses to the writing; if the subscribing witnesses are living, and can be had, they must testify, before an inferior evidence is admissible—but if dead, or cannot be had, then the other proof may be introduced; and this may be by other witnesses who were present and saw the party sign the contract; by the confession and acknowledgment of the party, that he executed the writing, or by his hand-writing; for men are distinguished by their manner of writing, and the shape of their letters, as well as by their faces; and therefore where it can be proved by witnesses, that know the writing of the party, that the signing of the instrument is his writing; or where it appears from a comparison with other writings, proved to be made by the party, this shall be deemed sufficient evidence of the execution of the contract, unless it can be disproved by the party himself.

It is a general rule of law that all contracts reduced to writing are to be construed according to the intention of the parties apparent on the face of them, and that no *parol* testimony can be admitted to contradict, controul, or vary their operation.

As to rasures, and interlineations in written contracts, the general rules are, that if a deed be altered by a stranger, without consent of the obligee in a point not material, this does not avoid the deed; but it is otherwise if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party that delivered it, when there is any material difference from the sense of the contract; but if the contract does contain the sense of the parties, the witnesses may well swear it to be their act; for an immaterial alteration doth not change the deed, and consequently the witnesses may attest that very deed without danger of perjury.

But

*a* But if the deed be altered by the party himself in a point not material, it will avoid the deed; for when the party himself makes any alteration in his own deed, it discharges the contract; for the contract hath the whole form from the words of the obligor; if the obligee undertakes to supply it with new words, and to alter those the party has fixed upon, this is according to the rules of the law, which takes every man's own act most strongly against himself, a new making, and framing of the contract, and for a man to contract with himself, is utterly void and ineffectual. Another reason of this interpretation of the law, is to add a sanction to deeds and written contracts, that persons who have them in their custody, might not meddle with them, for fear of destroying their own securities. *b* If there be several covenants in a deed, and one of them be altered, it will destroy the whole deed. *c* If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet the obligation is void; but in such cases a redelivery would cure the defect. *d* But if any immaterial part of the contract be added after delivery, by the assent of the parties, it will not avoid the deed, for it is in effect the same contract.

II. Of unwritten Evidence. Unwritten or parol evidence is, where the witnesses appear in court personally, and testify orally. In discussing this subject, I shall consider,

1. Who may be witnesses. 2. Who may not be witnesses.
3. The instances in which a party may testify in his own cause.
4. The number of witnesses required by law. 5. Presumptive proof. 6. Hearsay Evidence. 7. The general rules of Evidence.
8. The process compelling the appearance of Witnesses. 9. Depositions. 10. Demurrer to Evidence.

1. Who may be witnesses. All persons may be witnesses, (not hereafter particularly excluded) who have sufficient discretion, and may be presumed to have a just sense of the nature of an oath; and the obligation it lays them under to speak the whole truth. There is no precise age fixed at which infants may testify. This must depend upon the discretion and capacity of an infant, when offered as a witness. Where they are so young as to render it doubtful



doubtful, the court may examine them respecting the nature and obligation of an oath, and if they are satisfied that they possess so much discretion and understanding that they would be liable to be punished for perjury in case of false-swearing, they may be admitted as witnesses. Infants under the age of nine years have been allowed to be witnesses.

*b* All persons who believe in the existence of a God, let their religion be what it will, may be admitted to be witnesses. An oath is a solemn appeal to the Supreme Being, that he who takes it will speak the truth, and an imprecation of his vengeance, if he swears false. The usual form of our oath is grounded on no particular religion. If then persons of any other religion besides the christian, will take the oath in the common form, it might be allowed: but the general rule is, that in all cases aliens shall be allowed to take the oath in the most solemn form, according to the laws and religion of the country where they belong. In England in early times, infidels and Jews were not allowed to be witnesses, but the liberal spirit of modern times has exploded this principle, and Mahometans have been allowed to be sworn on the alcoran, and Gentoos, according to the most solemn form practised in their country.

*c* In actions of trespass against several defendants, the plaintiff may after issue is closed, strike out any of them, for the purpose of improving them as witnesses. So where trespass is brought against several, and on the trial there is no evidence against some of them, those against whom there is no evidence, shall be sworn and allowed to testify notwithstanding their being joined in the suit: for if the plaintiff arbitrarily makes a person defendant, to prevent him from testifying, he shall not prevail by such an artifice: for if this were allowed, the plaintiff might turn all the witnesses into defendants and prove what he pleased without contest: and in such case, the defendant admitted to be a witness, does not swear in his own justification, but in the justification of another with whom he is joined in the action unnecessarily. *d* But this rule must be understood where there is no manner of evidence against the defendant offered as a witness; for if there be evidence against one, tho not enough

*a* 1 Atkyns, 19.

*b* 2 Strange 1104.

*c* Gilb. L. E. 134.

*d* Ibid.

to convict him in the opinion of the court, yet such person can be no witness for the other, because his guilt, or innocence must wait the event of a verdict, for the jury are the judges of the fact and not the court, and the jury from their own knowledge may have further light in the fact than what they have from the testimony in court. A judge may be a witness and so may a juror; but then a juror must be called upon to give his evidence in open court, and may not be examined privately by his companions, and if he is, this will be good cause to set aside the verdict upon a motion in arrest; but if he gives his opinion founded on the character of the parties or witnesses it is otherwise.

2. Who may not be witnesses. All persons are excluded from testifying who want discernment, who are infamous, who are interested, and attorneys who are intrusted with the secrets of their clients.

1. Persons excluded for want of discernment, are infants under the age of discretion, idiots, and lunatics, excepting during lucid intervals, and to facts which came to their knowledge during such intervals.

2. Persons may be excluded from testifying who have been guilty of crimes and misdemeanors, which affect their credit and render them infamous, as where they have been convicted of the crimes of high treason, of felony, forgery, perjury, subornation of perjury, conspiracy, theft, and barratry—So a person is excluded who has had an infamous judgment, and has stood in consequence of it in the pillory, or has been stigmatized or cropped; but the crime must be such as to render a man infamous; for if a person be set in the pillory for a libel, it will not disable him to be a witness.

*a* It is not necessary that an infamous punishment be actually inflicted to exclude a person from being a witness: it is sufficient that he is convicted of an infamous crime. *b* In all cases, the record of the conviction must be produced in court, to exclude a person from testifying on the ground of his conviction of an infamous crime. *c* A pardon would restore the credit of witnesses in all cases but a conviction for perjury: for in that case, this disability is a part of the punishment. No witness can be compelled to answer any question that tends to criminate himself. It

*a* Salk. 688. Idem, 689. *b* Morgan's *Essays*, 259. *c* 1 Vent. 349. Salk. 689.

ness who is interested in the action, that is, who is to be a gainer or loser by the event of the suit, whether such advantage be direct and immediate, or only consequential. The interest which amounts to a disqualification must turn the course of some profit, bettering the witness's condition or estate, not the interest arising from establishing a higher character, or exculpating himself from a charge of negligence or neglect.

The party who objects to a qualification of a witness, because he is interested in the event of the suit, may either show it by direct proof or he may disprove it by an affidavit or oath; but then or perhaps best of all he must shew with the same witness. If the witness oath be shewn to be in such a person, he is only to be questioned respecting his interest, and whether he shall gain or lose by the event of the suit. If he will fully answer in the negative, he must be admitted: but if on trial his interest should become apparent, his testimony ought not to be regarded.

It is a rule that has been repeatedly recognized by our courts, that where a witness is interested in the question to be tried, he cannot be admitted to testify in the suit on account of the bias it throws on his mind. Thus where the question in the action respected a fraudulent conveyance, a witness was offered who had attached estate dependent on the same conveyance, but was rejected by the court because he was interested to prove the conveyance to be fraudulent, to recover his own debt, and therefore was interested in the very question on trial. But as the verdict could not have been given in evidence in his favour, and as it could not be known whether he would ever bring an action, there does not seem to be that certainty of interest which ought to exclude a witness.

In fact in all cases where a person is interested in the question to be decided by the event of a suit, and not in the suit, it would be better that this should go to the credibility, than the competency of the witness; and this is the prevailing doctrine in the courts of Great Britain. In all cases of joint trespasses, the plaintiff may improve a joint trespasser not named in his action, to be a witness against the rest: also their conviction will forever bar an action against

against such witness for the trespass. • A naked trust without interest, does not exclude a person from being a witness.

• Generally if the interest be ever so trifling, provided it be certain, it shall prevent a person from being a witness: but where corporations, as towns, and societies are concerned, the members are allowed to testify from the necessity of the case, as no other person can be supposed to know the facts, and their exclusion would render it impossible to obtain any proof; and the interest generally is so trifling as it respects each individual, that it cannot be supposed to operate upon the mind with sufficient influence, to induce them to deviate from the truth, and commit perjury—But in cases of corporations, agents as they are more immediately and personally concerned in the suit, are not allowed to be witnesses.

• A person may be admitted voluntarily to testify against his interest, but cannot be compelled. In all cases where a person is offered as a witness and it appears that he is interested, if he can become disinterested by any act, he may be admitted. For this purpose he may discharge the defendant or plaintiff of any demand which he has, that is affected by such suit, or may receive discharges from them or any other persons: and if it be in the power of the person offering the witness, or of the witness to release or destroy his interest, he may be a witness, and this may be done in open court while the case is on trial, with the express design to let him in to testify: but it may be considered how far such circumstances may affect the credit of the witness.

4. • Attornies may not be permitted to discover the secrets of their clients, intrusted to them in the confidence of their employments tho they offer themselves for that purpose; for it is the privilege of the client, and not of the attorney. It is contrary to the policy of the law to permit any person to betray a secret with which the law has entrusted him. But there are cases in which attornies may be examined: first, as to what they knew before their retainer, for as to such matters they are clearly in the same situation with any other person, and otherwise a party might conceal evidence by retaining a material witness, if he belonged to the profession of the law. Secondly, to a fact in his own know-

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ledge.

• Gilb. Law Ev. 122.

• Kirb. Rep. 203.

• 1 Stran. 140.

pose him to be a witness to a deed produced in the cause, he shall be examined as to the time of execution. So if the question be about a rasure, or interlineation in a deed, he might be examined to the question, whether he had ever seen such deed in other plight, for that is a fact of his own knowledge: but he ought not to discover any confessions his client may have made to him on such head. *a* But the facts which the attorney is not bound to disclose are such communications as are made to him by his client pending the suit, as instructions to him in the conduct of it, for if matters are disclosed to him after the end of the suit, tho they may respect it, he may be called on to give evidence of those. *b* Communications however confidential and under the promise of secrecy made to any persons but attorneys, must be disclosed by witnesses when under oath. *c* An attorney is not bound to produce papers, and such like, which may have been delivered to him by his client as evidence against him: for such would be equally contrary to the policy of the law.

3. The instances in which a person may be a witness in his own cause. It is a general rule of law, that a man cannot be a witness in his own cause: in civil causes, the rule is equally extensive, that husband and wife cannot testify for each other, and this is the only relation that excludes witnesses. But from necessity, certain exceptions to the general rule, that no man can be a witness in his own cause, have been introduced, because other testimony could not be obtained.

1. The parties are admitted as witnesses in actions of book debt. 2. In all cases where a bill of usury is filed on the second day of the sitting of the court, the plaintiff is compellable to disclose his knowledge respecting the facts in question, and may appeal to the conscience of the defendant. 3. The agent, factor, trustee, attorney, or debtor to an absconding debtor, in a *scire facias* brought against him is compellable to disclose on oath, and discover any estate in his hands or debts that he owes, that are the estate of the absconding debtor. 4. In cases of private assault, the party is by statute admitted to his oath from the necessity of the case.

5. In  
*a* Mills, vs. Griswold. Sup. C. 1792    *b* 3 Burr. 1687.    *c* Esp. dig. 718+

5. In certain actions of trespass given by statute, the party may be a witness. 6. In *qui tam* prosecutions for theft, the party is admitted to swear to the loss of the goods and their identity. 7. In suits to recover for counterfeit money, the party is admitted to swear to his receiving the money. 8. In prosecutions to recover for the maintenance of bastard children, the mother is admitted as a witness.

4. Of the number of witnesses required by law. By our law one credible witness is considered as sufficient to prove any matter of fact, in a suit of a civil nature. This has ever been the common law of England, and the principle is founded in reason; for in the common intercourse of mankind, it will frequently happen that a greater number of witnesses could not be obtained with respect to questions of fact, and as the human mind may be satisfied of the truth of a fact by a single witness, it would be unreasonable to require higher proof; but the Roman law, which has been highly celebrated, and to which the modern nations of Europe are greatly indebted for their jurisprudence, required two witnesses to prove a fact.

5. Of presumptive Proof. In all cases direct and positive proof is to be adduced if it can be obtained; but if this be impossible, then the law admits of circumstantial or probable evidence. Presumptive proof is either violent, or probable. Violent presumptions are, where circumstances are proved which usually and necessarily attend the fact; and are therefore considered to be full proof till the contrary appears. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword. This is a violent presumption that he is the murderer, for the blood, the weapon and the hasty flight, are all the usual concomitants of such a horrid deed, and the next proof to the light of the fact itself is the proof of those circumstances, which do necessarily attend such fact. So if a man gives a receipt for the last year's rent it is presumed that the former is paid: for a man is supposed to collect debts of the longest standing.

Every presumption is more or less violent according as the several circumstances sworn, do more or less usually accompany the fact to be proved. Where possession has always accompanied

as the fact it is a strong presumption of its validity. With regard to the other proceedings, it is impossible to lay down precise rules by which a jury are to be governed. Each particular case must depend upon its own facts, and circumstances.

6. *Of Hearsay Evidence.* It is a general rule, that the hearsay of a person who is neither a party or a witness in a suit, cannot be admitted to be given in evidence.—*a* Where two are jointly and severally bound in an obligation and action brought against one, proof of what the other has said, cannot be admitted. *b* Where a person, has been heard to say, who is interested in the event of the suit; but is not a party and cannot be a witness, cannot be given in evidence: for tho a person may testify for himself, he cannot for another. What a party to a fraudulent conveyance, but not to the suit, has been heard to say, is not admissible evidence. But to this general rule there are some exceptions.—Where either of the parties stand in the place of the person whose conversation is offered to be proved, the other may be admitted to prove such hearsay. *c* In *scire facias* against a garnishee, he may prove that the person to whom he is challenged to be a debtor, has acknowledged, that he owed him nothing, for the plaintiff stands in his place. So what the testator said, is good evidence in an action by the executor or administrator, for they represent him. So where the agent to one party, who made the contract, said at the time when it was made, may be proved in an action respecting that contract, for he was in the place of the party.

What old people have been heard to say with respect to the bounds of land, and who are dead, may be given in evidence in an action where the bounds are in question. *d* Where positive proof is not to be had, the declarations of persons uninterested, and who are then dead, may be given in evidence. As in questions of legitimacy, it has been practised to admit evidence of what the parents have been heard to say with respect to their marriage. So hearsay is good evidence in cases of pedigree, as to prove who was a man's grandfather. *e* In questions of prescription, hearsay is good evidence to prove a general reputation.

Hearsay

*a* Kirb. 179. *b* Ibid, 62. *c* De Wit, vs. Baldwin, Sup. C. 1789.  
*d* Elph. Dig. 784, 785. *e* Ibid, 786.

Hearsay is admissible evidence to prove what a witness has said, either in corroboration of his testimony, as to shew that he is consistent and has uniformly told the same story : or in contradiction of it, to shew that he has before told a different story, and that he is not to be credited. What the party has been heard to say or acknowledge against his own interest, may be admitted to be given in evidence against him : but he cannot be allowed to prove what he has said in his own favour. Thus when a party has acknowledged the commission of a trespass, the existence of a debt, or the execution of a contract, it is good evidence ; so is any thing he has said respecting any matter in dispute. But when proof is admitted of the confession of the party at any particular time, the whole of his conversation shall be taken together, and not some detached part of it ; for it may be the case that some expression taken separately might operate against him, but would not if taken in connexion with the whole story.

7. The general Rules of Evidence. He who produces a witness has a right in the first place to go through with his examination, then the other party may cross-examine him.

1. \* The first general rule of evidence is, that in every issue the affirmative is to be proved. This rule is founded in the nature of things as a negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed till it is proved ; but when the affirmative is proved, the other party may contest it by opposite proofs, for that is not properly the proof of a negative, but of a proposition totally inconsistent with what is affirmed.

2. † A second general rule is, that no evidence need be given of what is agreed by the pleadings, for the jury are only to try the matter in issue between the parties, so that nothing else is properly before them. So the jury cannot find any thing against that which the parties have affirmed, and admitted of record, tho the truth be contrary.

3. \* A third general rule is, that wherever a man cannot have advantage of any special matter by pleading, he may give it in evidence

\* Bull. N. P. 298. Espin. dig. 778. † Ibid. ‡ Doug. 155.



evidence under the general issue. *a* In trover, the defendant *may* give a special justification in evidence, because he cannot plead it.

4. A fourth general rule of evidence is, that the best evidence which the nature of the thing admits and is capable of, must always be given. The true meaning of the rule is, that no such evidence shall be brought that from the nature of the thing supposes still better evidence behind, in the parties power or possession; for such evidence is altogether insufficient and proves nothing; as it carries a presumption contrary to the intention for which it is produced; for if the greater evidence could make for the party, why is it not produced? This rule therefore consists of two parts. 1. It must be the best evidence. 2. It must be in the party's power, or possession; for if not, it is not his default that it is not produced; therefore where any deed, or instrument appears to be lost, without any fault in the party, in such case, a copy is good evidence. *b* Therefore no parol evidence of any fact or agreement shall be admitted, where there is written evidence of such fact; for written evidence speaks for itself, is liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain, and fallible.

*c* If the original is proved to be lost or destroyed, then copies are admissible; for then the copy is the best evidence. So if the original is proved to be in the hands of the opposite party, in such case a copy may be given in evidence, if such party refuses to produce it upon notice given for that purpose. But if a copy of a deed or such like instrument is offered in evidence on the ground of the original being lost, it must be proved by a witness, who compared it with the original, otherwise there would be no proof of the copy, or that it had any relation to the deed. If there be no copy, then parol proof is admissible with respect to the import and contents of the writing. *d* Where a copy is offered in evidence, sufficient probability must be shewn to the court, to satisfy them, that the original was genuine, as well as that it was lost, before the party shall be admitted to read it.

5. *f* A fifth general rule of evidence is, that parol evidence can

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*a* 1 Jones, 240. *b* Espin. dig. 780. *c* Bull. N. P. 294. *d* 1 Mod. 4.  
*e* 1 Atk. 446. *f* Espin. dig. 787. Bull. N. P. 497.

never be admitted to explain, controul, vary, or contradict written : but where there is a doubt on the face of the words, respecting the matters to which they refer, in such case parol evidence may be admitted to explain such facts. Ambiguities, or doubts respecting the construction of deeds, are divided into ambiguities that are secret, or not apparent, and ambiguities that are apparent. An ambiguity not apparent is, that which seems certain and without doubt, for any thing which appears on the face of the deed, or instrument ; but there is some collateral matter out of the deed or instrument, which creates the ambiguity. Where the ambiguity is of this nature, parol evidence is admissible, for the instrument itself being certain, but the doubt arising from something extrinsic, extrinsic matter should be admitted, particularly as it fortifies and gives effect to the written evidence.

But where any implication or construction of law arises from any written evidence whatever, parol evidence may be admitted to explain that implication ; for that is not to alter the written instrument itself. The implied revocation of a will by a subsequent marriage and birth of a child, is liable to be rebutted by parol evidence. <sup>a</sup> So where the testatrix devised her estate to her cousin John Cleere, and there were both father and son, of that name ; it was held that parol evidence was admissible to prove, that the son of that name was the person meant ; for as the objection arose from parol evidence, parol evidence ought to be admitted to answer it.

<sup>b</sup> An apparent ambiguity is that which appears in the face of the instrument or deed, and is an omission, and can therefore never be supplied by an averment, for that in effect would be to make that pass without deed, which the law appoints shall not pass without deed. As where there was a devise in a will, but the devisee's name was omitted, it was held that parol evidence was inadmissible to shew who was meant : for that would be to add to the instrument.

<sup>c</sup> In a special action of indebitatus assumpsit, for part of the price for which land was sold and conveyed by deed, two questions arose, whether the plaintiff might introduce evidence to prove that the land had not been paid for, contrary to his acknowledged

<sup>a</sup> Bull. N. P. 297. <sup>b</sup> Ibid. Espin. dig. 788. <sup>c</sup> Cont vs. Tracy, ment  
Sup. C. 1792.

and whether parol evidence by the statute of frauds and perjuries was admissible to prove money to be due in consideration of the sale of lands. The court determined that the acknowledgement of a consideration having been received in the deed, is necessary to authenticate the deed, and estops the grantor from denying it, but is not evidence of the actual payment of the money, so that the plaintiff may prove any subsisting obligation for the money whereby it is still due : and that this contract having been executed on the part of the plaintiff, is thereby taken out of the statute, and to allow the defendant to take advantage of that statute, would be perverting a statute made for the prevention of fraud, to the protection of fraud.

6. \* As to the point how far the characters of witnesses may be impeached on trials it is settled, that in the impeachment of the credit of a witness, you can only enquire and examine into his general character in respect of truth ; but may not be admitted to prove particular facts ; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice. In these cases, the witness is not to give evidence of his particular opinion, with respect to the character of the witness, attempted to be impeached from mere personal knowledge ; but what is the common reputation of the witness, in the general estimation of his neighbours and acquaintance.

A party shall never be permitted to bring general evidence to discredit his own witness ; for that would be to enable him to destroy the witness, if he spoke against him, and to make him a good witness if he spoke for him, with the means in his own hands, to destroy his credit if he spoke against him. But if a witness proves a fact in the cause which makes against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise : for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first ; but the impeachment of his credit is incidental and consequential only.

7. † The last general rule of evidence is, that if the substance of issue be proved, it is sufficient : but this rule in its greatest extent

\* Bull. 297. Espin. dig. 790.

† Ibid.

is applicable only in cases founded on torts ; for there it is not necessary to prove the trespass or injury to be done on the day alleged : *a* and in action of waste for cutting twenty ashes, proof that the defendant cut ten is sufficient, for the issue is waste or no waste.

In all actions on parol contracts the day is not material, and in actions of implied promise it is not necessary to prove the precise sum declared for. *b* But in all actions founded on express contracts whether parol or written, the plaintiff must prove the contract stated in his declaration, expressly as laid ; and a variance may be taken advantage of under the general issue ; for his proof must correspond with his allegations. *c* The plaintiff declared on an agreement by the defendant, to deliver him good merchandizable corn ; proof of an agreement to deliver corn of the second sort, was held not to support the issue. *d* The plaintiff declared on a note for West-India goods, and the note produced in evidence was for rum and molasses, the variance was held to be so material, that the note did not support the issue. *e* So in assumpsit against several, a joint contract must be proved or the issue is not supported.

*f* The plaintiff's proof must correspond with his title as laid in the declaration. *g* As in action by a landlord against his tenant for negligently keeping his fire, the declaration was of a demise for a term of years, and the evidence of a tenancy at will, this variance was held to be fatal,

It has already been remarked that one witness is sufficient to prove a fact ; but as in the course of trials a number of witnesses are adduced on each side, whose testimony is not entirely consistent, it becomes necessary to adopt some general rule to direct the mind of the triers in weighing the evidence laid before them.

Where there is an apparent inconsistency or contradiction in the testimony of witnesses, it is a general rule that such interpretation and construction shall be put upon it as to make it agree if possible : for the law will presume that every body swears the truth, and that no man will be guilty of perjury. If such construction can be given

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*a* Co. Lit. 282. *b* 1 Espin. dig. 141. *c* Ld. Raym. 735. *d* Brewster vs. Dean, Sup. C. 1792. *e* Bull. N. P. 139. *f* 1 Espin. dig. 141. *g* Doug. 668.

as will reconcile their testimonies, it shall be preferred to a construction that will make them disagree. But if the testimony of witnesses be so contradictory that it cannot be reconciled, as if one testifies in the affirmative, and the other in the negative, the affirmative witness is to be believed, for it is a general rule, that one affirmative witness outweighs several negatives. The negative witness can only swear that he does not know the fact, the affirmative swears directly to his knowledge of the fact. Therefore the fact which the affirmative swears to be true, may be so, while the other knows nothing of it, and of course both swear to the truth according to their knowledge. In this way, the testimony is easily reconciled, and the oath of the affirmative witness is to be relied on. Where two persons are at the same place, one swears that a particular fact happened, and the other that it did not, this makes the contradiction to be more express than if he said he did not see it: for it is possible that their situation may be such that a witness may know with as much certainty that the fact did not happen, as it could be known that it did: but even in such cases where the credit of the persons are equal, the affirmative witness is to be believed, for the fact may have happened, and the negative witness did not see it, or he may have forgotten it. But the affirmative witness could not see and remember a fact that did not happen, he must therefore be believed, or be supposed to be guilty of perjury; while the other may be cleared of any such suspicion.

It is a general remark that a negative cannot be proved.—Where witnesses swear affirmatively to a fact, it will not be sufficient to disprove it by witnesses, who deny it; but it must be done by proving other facts not only contradictory to it, but inconsistent with it, and which shew that such fact could not have existed.—Where witnesses swear to facts that are directly repugnant and contradictory to each other, their testimony cannot be reconciled, but we must have recourse to other rules to decide, which is to be credited. Thus, if a witness swears that he saw a person commit a certain trespass at a particular time, and another witness swears that he saw the same person in a different place at a distance at the same time, here the testimony of both is affirmative, contradictory and irreconcilable.

Where

Where the number of witnesses adduced by each party is different, and their characters and means of knowledge equal, the greatest number of witnesses to a fact must be relied on, in preference to the smaller. Where the number of witnesses are equal or unequal, on both sides, if their characters and means of knowledge are different, then the weight of evidence must preponderate upon the following principles.

1. The general character of witnesses in point of truth must be considered, and other witnesses may be called upon either to impeach or support their characters. Where the character of a witness is supported by the opinion or testimony of persons of credit, that he is a man of truth, his testimony acquires strength and confirmation. But where witnesses of repute testify that the general character of the witness is not good, and that his testimony is not to be relied on, the jury ought to disregard it. But the witnesses who are called upon to support or impeach the character of witnesses, ought to be of fair and unblemished reputations : and the effect of their testimony will be in proportion to the goodness of their character, for they may be impeached as well as others.

2. The credit of a witness is to be judged of in some measure according to his state and dignity in life, for men whose education and stile in life has rendered them respectable, and who are in affluent or easy circumstances, are supposed to be more hard to be prevailed upon to commit perjury, than those who by their poverty are exposed to the temptation of bribery.

3. The total indifference of the witness to the point in question, will essentially corroborate his testimony; for where a person is particularly connected with, or nearly related to the party, it is presumable that however honest he may be, an imperceptible bias will be thrown on his mind, and he will naturally be influenced to testify as favourable as possible for his friend. We may therefore in many instances refuse full credit to the testimony of an honest man, tho we believe him to aim at the truth, because of this prejudice which may operate without his knowledge. The truth of this remark will be often observed where parties call upon witnesses from their family, tho perhaps they may agree in the general tenor of

of the story with indifferent witnesses, yet a certain prejudice it may be observed will commonly induce them to state strongly those facts which they think will operate in favour of their relations, and colour those favourably which they think will operate against them. Where a person whose character is not very good is thus connected with the party, but little regard is to be paid to his testimony.

4. The means of information and the discernment of the witnesses, will have great weight in confirming their testimony. For when the witness has had the best means of knowledge, and can give a good account and reason for his recollection, and can point out the circumstances that usually and naturally attend the transaction, he is to be credited in preference to one who cannot explain the grounds of his knowledge, and testifies directly to the material point, without being able to detail the usual and probable attendant circumstances. But still a witness in certain cases is to be distrusted if he is more minute and particular in his recollection than is probable; for if the transaction be of an ancient date, and the witness relates some trivial circumstances, which would not probably be remembered for so long a time, it is to be presumed that he has fabricated the story, and relates such minute circumstances to acquire credit.

5. The probability of the story according to the nature of things, is much to be regarded in weighing evidence. When a witness relates facts, which are very improbable in their nature, or attended with improbable circumstances, he is to be suspected, and it requires more evidence to convince the mind of such facts, than where they are according to the ordinary course of things.

6. The manner in which a witness relates the story, will contribute much to impress the minds of the triers with a conviction of its truth. It is hardly possible to describe that peculiar manner of telling a story which is calculated to make people believe it. The discernment of courts and juries in this way may often find strong grounds to convince their minds. There is a certain artless and unaffected air, and a plain concise manner in giving testimony  
which

which impresses the mind with irresistible conviction of its truth. When a witness appears to be impartial, candid, and dispassionate, and has a clear understanding of the matter, he will be credited : but there are many instances where honest, but ignorant people testify in such a confused, inaccurate and blundering manner, that their story makes little impression on the mind. Where a witness is passionate, and vehement, expresses himself with unusual confidence, and makes solemn protestations that what he says is true, he is to be distrusted : for where a person is conscious that he is speaking the truth, he will have recourse to no such artifice to enforce it : but when he knows he is uttering falsehood, it is natural for him to practice such arts to persuade people to believe him.

7. In the course of the evidence, the triers will often find in certain collateral circumstances, which are testified, a clue that will lead them with more infallible certainty, than direct evidence, to the discovery of the truth ; and by which they may explain and correct direct evidence, and ascertain how far it is to be credited. In respect of such circumstances the parties, or the witnesses have rarely art and cunning enough to be guilty of misrepresentation, and they may often form a train of probable proof on which the mind may safely rest.

In all cases he who takes the affirmative side of the issue, is bound to adduce sufficient evidence to convince the minds of the triers of its truth. If the other party can produce evidence of equal weight and credit to counteract it, or can render it very doubtful, the issue must be adjudged not to be supported : for no man ought to recover from another, when his right is rendered very doubtful and uncertain.

After having explained the rules of the law that are calculated in the best manner to discover truth, we cannot omit to make the melancholy remark, that human testimony, the only source of truth with respect to facts, is so corrupt and fallible, that it is too often impossible to discover it. Misrepresentations frequently arise from the weakness and ignorance of witnesses, as well as from their wickedness : but as this is the only mode of settling controversies, and as society requires that there should be an end of disputes, the law



law has granted to with the best possible interest - and we have the satisfaction, that the controversies are not always settled right, yet they are settled: which answers the important end of promoting the peace of society.

8. *Of the process of compelling the appearance of witnesses.* It is provided by statute that if any person upon whom lawful process, or summons has been served to appear, and testify concerning any cause or matter depending before any court, and having tendered to him such reasonable sum for his cost and charges, as having respect to the distance of the place, is necessary to be allowed, does not appear, having no lawful or reasonable excuse therefor, shall for every such offence forfeit thirty shillings, and pay to the party grieved, such damages as he shall sustain by reason of his default of appearance, to be recovered by bill, plaint, or information, in any court of record.

9. *Of Depositions.* The practice of taking the depositions of witnesses to be improved in courts, is unknown to the common law, and was introduced by statute.

When a witness is going to sea or out of the state, lives more than twenty miles from the place where the case is to be tried, or by age, sickness, or bodily infirmity, is rendered incapable of travelling and appearing at court, any assistant or justice of the peace may take affidavits out of court, provided a notification with reasonable time, be made out, and delivered to the adverse party, if within twenty miles of the place, or left at the place of his dwelling, or usual abode, to be present at the time of taking such affidavit, if he think fit. Every such witness shall be carefully examined and cautioned to testify the whole truth, and being sworn, the assistant, or justice shall attest the same, with the time of taking, and that the adverse party was present, if so; or that a notification was sent to him, if so; and shall seal up the testimony and deliver it to the party, or he may deliver it unsealed to the court: The witness must subscribe the deposition, and the assistant or justice must direct it to the court where it is to be improved. No person interested shall write, or draw up the testimony, nor an attorney in his client's cause, and if the deposition be taken in any other way, or after being sealed, is broken open, it shall be rejected.

Witnesses

Witnesses to wills may be sworn before the next justice or justice of the peace, and the oath entered on the back of it, which shall be as effectual as if they appeared before the court in person. If a person refuse to appear, and give his deposition, he is liable to the same penalty as for refusing to appear before a court as a witness.

*a* It has been determined by our courts that when depositions are taken out of the state notice should be given to the adverse party, or to his known agent, or attorney if within twenty miles of the caption, and if the party himself lives out of the state, and has a known agent, or attorney in the state, he shall be notified.

*b* That where depositions are taken in this state, within twenty miles of the adverse party, who lives out of the state, notice must be given him to attend at the time of taking, or they will not be admissible. *c* When several are joined in a suit, depositions cannot be improved against such of them as are not notified of the taking, but each person must have notice, if within the distance the statute prescribes.

*d* That where the adverse party within this state lives more than twenty miles from the place of caption, if he has a known agent or attorney within twenty miles, such agent or attorney must be notified: but as this decision is clearly against the statute, it is not probable that it will long be considered as law.

*e* That a deposition drawn by the plaintiff, copied by a third person and afterwards sworn to before a justice, the adverse party cited and present, and an addition made by the justice, might not be read excepting that part added by the justice. *f* That depositions are admissible in qui tam actions. But this must be understood to be where no corporal punishment can be inflicted.

10. Of Demurrer to Evidence. *g* If the plaintiff or defendant give in evidence matter of record, or writings, or parol evidence, on which a doubt in law arises, the other side may demur to the evidence; otherwise if there be a doubt whether the fact be well proved; for the jury may find it on their own knowledge.

A demurrer to evidence, is an admission of the truth of the fact  
alleged

*a* Kirb. Rep. 1. *b* Moses vs. Geer, S. C. 1791. *c* Kirb. 100. *d* Williams vs. Fitch, S. C. *e* Grifwold vs. Grifwold, S. C. 1791 *f* Moses vs. Geer, S. C. 1791. *g* Co. Lit. 72. *h* Bac. Abr. 136, 137. Alcou, 18. Ray. 404. Bull. N. P. 113. *i* Morg. Essays. 448.

alleged by the adverse party, or an acknowledgment that the evidence produced by him at the trial of the cause, is true ; but denies its operation and effect in law, and thereupon the party demurs and prays the judgment of the court : for the fact being agreed on, the judges are the proper expositors of the law, and are to determine the same, and not the jury : but if a matter of evidence which is thought material be offered, and the court disallow or over-rule it, this is a proper matter for a bill of exceptions.

He that demurs to evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court ; and if the matter of fact be uncertainly alleged, or if it be doubtful whether true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereon, he that alleges the matter cannot join in the demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.

The practice in this state has been for the party demurring, to state the whole of the evidence in writing, and pray judgment of the court whether the same be sufficient to support the issue ; and if there be a joinder in the demurrer, the jury are to be dismissed. Where a demurrer to evidence on the trial of an issue by the jury is properly taken, the other party is bound to join by the common law : but on a question whether on a demurrer to evidence on a trial before a justice of the peace, the justice was bound to compel the other party to join in the demurrer, the superior court determined that a party is not compellable to join in a demurrer to parol evidence, and remarked that where an issue in fact is put to the court, who are judges of law, as well as of fact, the propriety of demurring to evidence, is very questionable. It has also been decided, that there is no propriety in demurring to parol evidence, before a justice of the peace, as it serves but to entangle his proceedings, and bring a re-hearing of the cause before the superior court, upon a partial stating of the testimony, when the questions are too trifling for an appeal to the common pleas.

There seems to be no propriety in demurring to evidence where  
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\* *Bulky vs. Clark* S. C. 1793.    b *Kirb. Rep.* 352.

The issue in fact is tried by the court, if the court has final jurisdiction; but where the facts are uncontested and the party wishes to remove the cause to a higher jurisdiction, to obtain their opinion, it may be proper to allow a demurrer to evidence, which lays a foundation for a writ of error. \* But the question has lately been decided. In the case of the town of Hampton, vs. the town of Windham, after the parties had agreed on a statement of the evidence which was chiefly written, the plaintiffs refused to join in demurrer; in consequence of which, on a motion to the court to order it, the question came regularly before the court, whether the facts being fairly stated, they would compel a joinder in demurrer to evidence, and the court decided that it was optional with the party and refused to compel it.

This decision is not only repugnant to the common law, but clearly militates against the first principles of our jurisprudence. It is a first principle, that the judges are to decide questions of law, and the jury matters of fact. One of the modes by which questions of law are to be brought before the court is, by demurrer to evidence: if the court cannot compel a joinder in demurrer, there is an end of that mode of proceeding: for a party when he knows the law is against him, will insist on a trial of the question of law by a jury, and from their ignorance of the law, may hope for a decision in his favour.

The inconsistency of the judgment in the case cited, is very strikingly manifested from the case itself. All the facts were agreed to by the parties, so that none were left for the jury to find. The only question was whether they were sufficient in law to support the declaration. The consequence was, that a mere question of law was submitted to the consideration of the jury. They found a verdict contrary to the opinion of the court, and yet the verdict of the jury must stand; for the facts not appearing of record, the court cannot revise or correct the erroneous opinion of the jury respecting the law; but if they had compelled a joinder in demurrer to the evidence, the facts would have been before them, and they could have decided with respect to their legal effect—That system of jurisprudence must be defective, where the jury can decide a

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\* Town of Hampton, vs. Town of Windham, Sup. C 1795.

question of law contrary to the opinion of the court ; and there is no mode by which it can be revised and corrected. It is making the jury final judges in points of law over the head of the courts, and is destroying the boundaries between the provinces of the judges and jury.

*a* A demurrer to evidence admits the truth of every conclusion of fact, which the jury could have inferred from the evidence demurred to, and the only question for the consideration of the court, is whether the evidence is sufficient to support the issue ; and in their judgment they must decide whether it be sufficient or insufficient. *b* By the English law, on a demurrer to evidence the party cannot take advantage of any objection to the pleadings : but as our mode of proceeding is different in respect of assessing damages, I presume on a demurrer to evidence, the party may take advantage of any defect in pleadings, in the same manner as he can in an issue in fact put to the court ; and that if the court find the evidence sufficient to support the issue for the plaintiff, yet if the declaration be insufficient, judgment will not be rendered in his favour. In cases where judgments are rendered upon a demurrer to evidence in favour of the plaintiff, damages will be assessed by the court, in the same manner as in cases of default.

When the parties have closed their evidence, the council for the party that takes the issue, opens the cause, and begins the argument. He is followed by the council of the opposite party, and the argument is closed by the council on the side that opened the cause.

The judge then publicly gives the charge to the jury. He states the case, and the evidence, with the arguments of the council, of each party, both with respect to the facts and the law. The court give no opinion with regard to the points of law arising in the case, nor does the judge give them any direction how to find the verdict, but the whole case is committed to them as relative to the law arising out of the facts, as well as the facts themselves.

The jury then retire to some private apartment under the care of some officer appointed by the court, usually a constable of the town where the court sits, and there deliberate upon the subject.

Jurors

*a* Doug. 134.

*b* Ibid.

**JURORS** are not confined in this state in the manner they are in England ; but have liberty to eat, and drink, and go where they please : but may not converse with any person about the cause under consideration, or take any new evidence, or inform what the verdict is till it is given up in court. They must unanimously agree upon a verdict, which is in many instances productive of delay, and may give an obstinate juror the power of controuling all the rest. If the jury cannot agree on a verdict, our courts have never adopted any coercive measures, but have taken back the papers.

After the jury have agreed upon a verdict, they return it into court, and if the parties appear, the verdict is delivered to the clerk, and read publicly. If it is approved of, and accepted by the court it is ordered to be recorded ; but if a majority of the court disapprove of the verdict, they may return them to a second, and a third consideration ; but on a third consideration if the jury adhere to their first verdict, the court must order it to be recorded. When the court return the jury to a further consideration of the cause, they give their reasons at large with their opinion, both with respect to the law and the facts. It may therefore be considered as a principle of our jurisprudence that in all issues in fact tried by the jury, they are equally the judges of the facts, and the questions of law involved in the facts : and that when the court dissent from the verdict of the jury, they have equal right to give their opinion in respect of the facts, and the law.

This is a defect in our judicial system. The court ought to have the power of directing the jury in points of law ; and tho they now have an opportunity to give them their opinion on returning them to a further consideration, yet this is after the jury by their verdict have formed their opinion, when there is danger that the natural obstinacy of the human mind, in adhering to opinions once formed, will induce them to disregard the opinion of the court, and when it is apparent that if the court ever ought to give their opinion to the jury with a view to influence their determinations, it ought to be before they have agreed on a verdict : for it is highly improper to leave the jury uninstructed and uninformed in regard to principles of law, till they have made up their judgment, and then

to give their information and instruction, with a view to induce them to alter their judgment. Verdicts are either general or special. A general verdict must find expressly, clearly and concisely, all the facts which are put in issue, or must negate them all. It is not necessary that the verdict should be in the very words of the issue, but it must find or negate all the facts substantially, or it will be ill. A special verdict is to find all the facts in the case, and submitting to the court the question of law arising upon them. If the law be so in such a point, then they find for the plaintiff with certain damages to be expressed, but if the law be otherwise, then for the defendant. A jury are never bound to find a special verdict, but may take it upon themselves to judge of the law, as well as the facts, but where the matter of law is obscure, and they cannot clearly, and safely give a positive verdict, they may find the facts specially, and the court will determine their legal operation.

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## CHAPTER TWENTY-FIRST.

### OF MOTIONS IN ARREST AND REPLEADERS.

**A**FTER the verdict of the jury is recorded, judgment of course is rendered upon it by the court, unless the verdict be set aside and the judgment arrested or stayed, for causes next to be enumerated.

1. *a* Judgment may be arrested for the insufficiency of the declaration. Tho the plaintiff has proved his declaration to be true, yet if he has not stated such facts as will entitle him to recover, and on which the court are warranted to render judgment, he must fail in his action. It is a general rule that the exceptions taken to a declaration under a motion in arrest, shall be such as would have been sufficient on a demurrer; but that every exception which would have been good on a demurrer, will not be good under a motion in arrest; for there are many defects in a declaration which are aided and cured by verdict. It is a matter of considerable nicety to distinguish what exceptions can be taken advantage of under a motion in arrest, and what defects are aided by verdict.

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A defect in the declaration which is excepted to after verdict, ought to be material and substantial, and not matter of form, or some circumstantial mistake. The defect must be in a point essential to the action, as where the plaintiff not only states his title in a defective manner, but sets forth a title which is wholly defective in itself. If from the facts stated, it appears that the plaintiff has, no right of action, it may be taken advantage of in arrest. If the plaintiff brings his action for the defendant's calling him a Jew, or for speaking words not actionable, tho the jury find the defendant guilty of speaking the words, yet judgment must be arrested. But where it appears from the declaration, that the facts are of such a nature, that the plaintiff has right of action and that the declaration is defective merely in point of form, or there is an omission of some particular circumstance which is essential to be proved to support the action, then such defect shall be aided by verdict. If in an action of trespass, the declaration does not state the trespass to have been done on some particular day, tho this would have been ill on demurrer, yet it is sufficient after verdict, because the court will intend that sufficient proof was offered to the jury of the facts, and the defendant shall not be admitted to unravel the whole proceedings and take advantage of an omission which he might have done at an earlier stage of the case. So in an action of trespass for taking away any article of personal property, if the plaintiff should not aver the value of it, this would be ill on demurrer, but cured by verdict; because the court will intend that the value of the article was proved to the satisfaction of the jury.

In any other part of the pleadings which are defective, advantage may be taken by a motion in arrest, in the same manner as to the declaration.

2. • Where the issue found by the verdict is immaterial, judgment may be arrested: for if the fact put in issue, is such that it does not decide the controversy between the parties, the verdict of a jury cannot aid it; but if the issue be informal only, then it is cured by verdict. As where an action was brought against the defendant a justice of the peace, for issuing a writ of replevin, without taking legal and sufficient bonds, he pleaded that the person  
recognized



recognized to prosecute the replevin was possessed of sufficient property in Hartford, on which issue was taken and verdict for the plaintiff, but judgment was arrested because the issue was immaterial ; for tho it was found that the surety had not sufficient estate in Hartford, yet if he had elsewhere, it would have justified the defendant, and this did not appear from the verdict.

3. *a* A verdict may be set aside where it appears that the court have no jurisdiction. As where the declaration counted upon a promise to pay sixteen pounds twelve shillings, and demanded thirty pounds in damage, the verdict was set aside in the superior court, because the matter in demand was below their jurisdiction.

4. *b* A verdict may be set aside and judgment arrested on account of a defect in the verdict itself. A verdict ought to find or negate all the facts put in issue. If it finds only a part, omitting something material, or if it varies from the issue in point of substance, it is bad : but if the verdict finds more than is put in issue, this is surplusage, which will not vitiate it. The verdict must find the facts put in issue with certainty and expressly, or it will be set aside.

*c* Where the jury find a verdict contrary to a matter of record or estoppel, or what is admitted by the pleadings, it is bad. A verdict cannot be set aside, because the jury have found contrary to law or evidence ; for by our practice they are so far considered as being judges both of the law and the facts, that courts have not been admitted to set aside verdicts, because contrary to their opinion.

5. A verdict may be set aside for misbehaviour in the jurors, or in the parties. *d* The jurors are to found their verdict upon the evidence given in court, and have a right to the papers, and exhibits adduced on trial ; but if they admit any paper material or any evidence not given in court, their verdict is bad. So if they send for and re-examine a witness improved on the trial, it vitiates the verdict. If they converse with either of the parties, or any other person upon the matters relating to the cause on trial, or if they inform their opinion before the verdict is returned into court, their verdict must be set aside.— *e* Where a juror when the case was under consideration related to a person the whole state of the proof

*a* Kirb. 351. *b* Bac. Abr. title verdict. *c* Kirb. 423. *d* 4 Bac. Abr. title verdict. *e* *Daia vs. Roberts*, S. C. 1789.

on both sides, judgment was arrested ; for the court said, that the only guard upon jurors is their oath, and if they are allowed to leap over that bound, and enter into conversation with others upon the merits of the case, the purity of trials by jury, the great fountain of liberty and justice, may in time become corrupted. <sup>a</sup> A verdict shall be set aside where the jurors have recourse to any matter of hazard, to decide which way they will find it, or what damages shall be given. <sup>b</sup> Thus where the jury being divided in opinion as to damages, agreed that each should mark on a piece of paper the sum he thought proper, and that such pieces of paper should be put in a hat or box, and that all the sums should be added together, divided by twelve, and that the product should be the rule in damages, the verdict was set aside on the principle that in trials nothing should be determined by chance.

<sup>c</sup> Regularly the jurors must all agree in the verdict ; but where any do not agree but assent to return it into court, because the rest will not agree with them, they shall not be admitted on a motion in arrest, to say that they did not agree to the verdict.

<sup>d</sup> A verdict cannot be set aside, because the jury have misapprehended the legal consequence of it ; as where in an action of slander, some of the jury agreed to a verdict for a sum in damages, under forty shillings, on the idea that full cost would be given, this was adjudged insufficient to arrest the verdict. Nor can a verdict be set aside, because the jury have found too high, or too low damages ; for this is properly within their discretion. If either of the parties treat or attempt to influence the jurors, or suppress any material paper or exhibit, given in evidence, or deliver to them a material paper not read in evidence, or excluded by the court, if the verdict be in his favour who has been guilty of such misconduct, it shall be set aside.

In all cases of motions in arrest, for any defect in the pleadings or in the verdict, the matter is apparent on the record : but where a motion in arrest is made for the misbehaviour of jurors and parties, the facts are not apparent on the record ; the parties are therefore admitted to state such facts as the grounds of their motion, and if denied, the court will proceed to enquire of witnesses with respect to their truth

<sup>a</sup> 2 Lev. 205. Bunb. 51. <sup>b</sup> Warner vs. Robinson, 8. C. 1790. <sup>c</sup> Kirb. 416. <sup>d</sup> Idem, 212.

truth, and it found true ; or if the parties demur, they will render judgment according to the nature of the transaction. If the party denies the facts to be true, he need not traverse ; the court will enquire and find the facts, and render judgment accordingly, but if he acknowledges the facts to be true, he may then demur. But it must be observed that the misbehaviour of jurors and parties are the only matters not apparent on the record, which are admitted in motions in arrest. \* Frequent attempts have been made to bring up on motions in arrest, the material facts and points in a cause decided by the jury ; but the courts have invariably adjudged, that after a general verdict, they cannot resort back to the evidence on which the verdict was founded, to set it aside, but must render judgment according to the facts found : tho they may be clearly of opinion that the verdict is repugnant to law and evidence.

A repleader is to be awarded in all instances where the judgment is arrested from a defect that can be amended, or avoided : but where it is for a defect that cannot be cured, as the insufficiency of the declaration, no repleader can be ordered. Where the issue was immaterial, a repleader will be ordered, because it may be supposed that a material fact may be put in issue. So where judgment is arrested for some defect in the verdict, or misbehaviour in the jurors or parties, a repleader will be ordered, and in all instances of a repleader, the pleadings commence anew.

Where issues in fact are put to the courts to determine, no motion in arrest can be made ; for the court immediately upon finding the facts render judgment, and there is no intermediate time in which the party can move in arrest : but when the issue is on trial by the court, they may take into consideration, not only the evidence with respect to the facts in contest, but also all matters apparent on the record which are proper grounds of arrest, and which might have been taken advantage of on motion after verdict, and render judgment according to law. In these cases, let the proof be as it will, the issue must be found in his favour who is entitled to a judgment upon the pleadings. If on the general issue, every fact stated be proved, yet if the declaration be insufficient, the court must find the issue in favour of the defendant ; because the plaintiff is not entitled to a judgment, tho he has proved his allegations.

CHAP.

## CHAPTER TWENTY-SECOND.

## OF JUDGMENT AND NEW TRIALS.

**J**UDGMENTS are either interlocutory or final. Interlocutory judgments, are given in some middle stage of the cause, and final judgments, are rendered in the termination of the suit.

Judgment is the sentence of the law, awarded and pronounced by the judges, after due enquiry, deliberation, and consideration, according to the established rules of law and the invariable principles of justice.

Judgments, may be rendered upon demurrer, verdict, default, confession, nihil dicit, and nonsuit.

1. In demurrers, the facts are confessed and the law controverted, and the court on determining the principle of the law must render judgment in his favour, who has the law on his side.

2. The verdict of the jury, ascertains the facts in dispute, and the court must render judgment for him in whose favour the facts are found.

3. When the defendant makes default of appearance, he acknowledges the law as well as the facts, to be against him, and judgment must be rendered by the court accordingly.

4. In cases of debt, and in such cases only, the party may not only confess a judgment against himself before an assistant or justice of the peace, but he may do the same in court.

5. Where the defendant appears, and refuses to plead, or to make any answer, judgment may be rendered against him upon nihil dicit, because he says nothing.

6. When a plaintiff withdraws his action, or becomes nonsuit, judgment may be rendered against him in favour of the defendant for his cost, which is no bar to a future action.

It is painful to observe the great number of judgments rendered by justices of the peace, which are reversed by the superior court, merely on account of the informality, and irregularity of the entry.

and record of the judgments ; when a very little legal skill is sufficient to avoid such errors, and prevent much needless litigation and expense. I shall therefore lay down a few general rules, which are calculated for courts of that description, and which would otherwise be unnecessary.

Justices of the peace ought to require the pleadings to be regularly closed ; but if the parties have not sufficient skill, the justice should make an entry of their pleas, whether it be a demurrer or the general issue, so that they may know the question to be tried. When the pleadings close in a demurrer, either to the declaration, the plea, replication, or rejoinder, the court must always give their opinion, as to the sufficiency or insufficiency of that part of the pleadings to which a demurrer is taken : for instance, if the demurrer is taken to the declaration, they must say, that the declaration is sufficient, or insufficient, according to their opinion. If they find the issue in law, or demurrer in favour of the plaintiff, they must after deciding that point, proceed to consider and give judgment, that the plaintiff recover such sum of debt, or damages, as they may think just with his cost. If determined in favour of the defendant, then judgment must be rendered for his cost. As for instance in a demurrer to a declaration, " This court is of opinion that the plaintiff's declaration is sufficient and therefore consider and give judgment, that the plaintiff recover of the defendant, such sum in debt or damages with his cost," or otherwise, " This court is of opinion, that the plaintiff's declaration is insufficient, and consider, and give judgment, that the defendant recover his cost," and in like manner, to the plea, replication, or rejoinder.

Where an issue in fact is closed, the court must always expressly find or negate all the facts put in issue. If it be the general issue of owe nothing, did not assume and promise, or not guilty, in all these cases, the court must say, that this court is of opinion, that the defendant, does or does not owe ; did, or did not assume and promise ; is, or is not guilty in manner and form, as the plaintiff in his declaration has alleged, and therefore consider and give judgment, that the plaintiff recover of the defendant, such sum in debt or damages with his cost ; or if the issue be for the defendant, then

for

for him to recover his cost. So if there be special pleadings and a traverse of some particular facts, then the court must find or negate every fact put in issue, and proceed to render judgment according to their finding of the facts : but they may in no case generally give judgment for one party or the other, as is often the case ; but they must always answer the pleas, and give judgment accordingly.

When judgment is rendered upon a verdict, it must be for the precise sum in damages found by the jury, when on confession, the parties agree on the sum ; but when judgment is rendered on demurrer, default or nihil dicit, the court must assess the damages. Where the action is founded on a contract, and is for a sum certain, without any dispute respecting the sum due, the judgment is a matter of course ; but if there have been payments, or if either party dispute the sum, for which judgment ought to be rendered, the regular method is to move the court, to be heard in damages, in which case, they may make all proper enquiries of witnesses, respecting the true and just amount of the debt, and render judgment for such sum as they shall find to be due. But if there be no motion to be heard in damages, the court ought not to render judgment for the whole sum demanded, if that is more than appears to be due from the declaration. <sup>a</sup> As where in an action of assumpsit for sixteen shillings, and demanding thirty shillings damages, the justice of peace rendered judgment on default, for thirty shillings, but the judgment was reversed, because it was apparently for more than was due.

<sup>b</sup> In the case of an absent debtor, execution was granted without the creditor's lodging a bond, as required by statute ; on writ of error the judgment was reversed, because it ought to have been, that execution be granted upon the plaintiff's lodging a bond agreeable to the statute.

Where the action is founded on a tort, as trespass, assault and battery, or slander, if on demurrer, judgment be rendered against the defendant, or if he refuses to plead, or makes default of appearance, then judgment may be rendered against him, for the sum demanded by the plaintiff, unless he moves for a hearing in damages, in which case, the court may go into an enquiry of witnesses with respect to all facts which are necessary and proper, to enable them to ascertain

<sup>a</sup> Lewis vs. Lawson, S. C. 1791.    <sup>b</sup> Strong vs. M'acham, S. C. 1792.

such sum as they shall judge to be just and reasonable.

Our courts possess the same power to assess damages, as a jury in England, upon a writ of enquiry, issued to the sheriff for that purpose. There, in these cases, the court must issue a writ to the sheriff, commanding him by twelve men to enquire into the damages and make return to the court ; which process is called a writ of enquiry, the sheriff sits as judge, and there is a regular trial by twelve jurors, to assess the damages. This mode of proceeding must be productive of expence and delay, and the practice of this state, introduced by our courts, without the authority of a statute, of assessing the damages themselves, without the intervention of a jury, is one of the many instances in which we have improved upon the common law of England.

It is a general rule, that the party in whose favour judgment is rendered, is entitled to cost : but to this there are some exceptions. <sup>c</sup> When judgment is arrested for the insufficiency of the declaration, the defendant shall not be allowed cost, because he might have demurred in the first instance, and saved the expence of a trial by the jury.

<sup>d</sup> It is also enacted by statute, that in actions of trespass, assault and battery, and trespass upon the case, in the superior and county courts, (except only where the title, or inheritance, or interest of land, or freehold estate, be the principal matter in question,) if the court or jury find damages under forty shillings, the plaintiff shall recover no more cost than damages, unless the action be removed by the appeal of the defendant, from an assize or justice of the peace, to the county court, or from the county, to the superior court, when the plaintiff shall recover full cost, if he recovers any damages.

It is evident that the legislature at the time of passing this law had no idea of the extent of the words trespass on the case ; for it will comprehend all actions founded on torts, without force, and all actions founded on contracts, excepting the original specific actions of debt, covenant and account. Our courts have never ex-

tended

<sup>c</sup> Kirb. 218.    <sup>d</sup> Statutes, 7.

tended it so far, and it is uncertain to what actions they would apply it. • It has been determined, that an action brought by a parent, for expences incurred in taking care of a child, wounded by the defendant, comes within this statute, and that no more cost than damages shall be allowed. *f* In an action of trover for an execution, the case was, that after the bringing the action, and before trial, the same came into the hands of the plaintiff, and the jury found a verdict for the plaintiff with twelve shillings damage only, and the question was, as the execution was for a much larger sum than forty shillings, whether the plaintiff should recover more cost than damage. The court allowed full cost, on the idea that tho he recovered but twelve shillings, which was the special damage, yet as the dispute respected an execution for a large sum, which he might be considered as recovering by the suit, he ought to be allowed full cost.

Tho this decision is equitable, yet it is clearly against the letter of the statute, and points out the expedients to which courts must resort, to evade the injustice of that statute. The legislature ought therefore to repeal it, and by statute explicitly designate the actions in which no more cost than damages ought to be allowed, and to confine the statute to such actions, where the public good may be promoted, and needless litigation prevented before the higher courts, by subjecting the party to a loss of his cost, who will prosecute a trifling and frivolous action: but such a regulation, ought not to comprehend those actions, where matters of large value may be in contest, tho the special circumstances of the case may be such, that small damages only ought to be allowed.

*g* When the defendant appeals on a judgment given on a plea in abatement, and shall not make good his plea by the judgment of that court to which he appeals, cost shall be awarded, and execution issued against him, however the case may finally issue.

*b* It has been determined, that on final judgment in favour of the plaintiff, after abatement and amendment of the writ, he shall recover no cost antecedent to the amendment, excepting, writ, duty, and officer's fees.

New

• *Kirb. f* Brick, &c. vs. Reed, S. C. 1789. *g* Statutes, 2. *b* *Kirb.* 89.



New trials were originally grantable only by the general assembly, but for public convenience, it has been provided by statute, *f* that the superior and county courts shall and may as occasion shall require and they judge reasonable and proper, grant new trials of causes that shall come before them, for mispleading, or for discovery of new evidence, or for other reasonable cause appearing, according to the common and usual rules and method in such cases.

It is by virtue of this statute, that the superior and county courts possess the power of granting new trials, and no other courts possess that power.

The proper mode of application to courts to obtain a new trial, is by petition, stating the substance or reciting the former action, with the reasons of the application ; upon which, a notification signed by proper authority is issued, and served upon the opposite party, by leaving with him, or at his place of abode, a copy of the petition and citation.

The petition ought to state the material points on which the case was decided, and the particular grounds of his application, so that the court may see how far they are essential, and will affect the merits of the case.

When the foundation of the application, is a discovery of new evidence, the petition should contain the substance of the evidence offered on the trial of the action, and also of the new discovered evidence, so that the court may judge whether if true it would be material and sufficient to turn the cause in favour of the applicant. Regularly, every new witness ought to be named in the petition ; but if the petitioner produce witnesses, who are named, and they testify, he may then adduce other witnesses, who can testify substantially to the same matters, as the other : but if witnesses are named, who are not admitted to testify, witnesses not named cannot then be admitted. *g* Where witnesses are offered to the same point, some of which are, and some are not named, it is indifferent which first testifies.

The evidence must not only be material, but it must be new discovered, and such as the party could not have obtained by proper attention

*f* Statutes 6.      *g* Dowd vs. Pelton, S. C. 1794.

attention : for a new trial shall not be granted for evidence which might have been obtained on the former trial, or on account of evidence discovered after the trial, which by using due diligence might have been discovered before. Therefore in a petition for a new trial, a witness was offered, and it appearing that he might by the use of due diligence, have been discovered and adduced on the former trial, he was rejected by the court.

When an application for a new trial is made on the ground of mispleading, the petitioner must state the plea which he wishes for an opportunity to make, so that it may appear to the court, that it would be sufficient to save his cause, for if it appears, that he has lost his cause by mispleading, yet if he cannot make a better plea, a new trial will answer no purpose, and therefore will not be granted. New trials for mispleading will be granted, in cases not only where the party has been guilty of such a mistake, that he has not fairly tried the question on which he intended to rest his cause, but also in cases where he has misjudged with regard to the point, on which he ought to have rested it. Thus where the defendant relied on a plea of tender, and did not aver that he always stood ready to pay the money, for which the plea on demurrer was adjudged ill. This was a mispleading, by which he failed to try the point, on which he rested his defence, and of course was a good ground for a new trial. So in an action for erecting a dam so high that it overflowed the plaintiff's land, the defendant pleaded a special matter on which he relied for his justification, which question on demurrer came fairly before the court, and was adjudged against him. He then petitioned for a new trial, on the ground of mispleading, because in his demurrer he had admitted the fact of overflowing the land of the plaintiff, by raising his dam to a certain height, which fact he averred was not true, and that he had mispleaded by admitting it to be true, and prayed for a new trial that he might traverse the fact, which was granted.

The petitioner must shew, not only how he ought to have plead, but also that he is able to support his new plea, that his defence is sufficient in point of substance, and true in point of fact.

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The discovery of new evidence, and mispleading, are the grounds of new trial expressly mentioned by statute, and there is a general authority given to the courts to grant new trials for other reasonable cause. This power may be extended so far, that in all cases where judgment has been rendered against a person, and he had no opportunity of a trial, or had not a fair trial, without any neglect or default on his part, and he can shew to the court reasonable cause for a new trial, with grounds sufficient to satisfy them that judgment ought to be in his favour, they may grant him a new trial.

A new trial cannot be granted, because the verdict was against law or evidence, or because the damages were unreasonable or excessive. Where the parties make a submission to arbitrators by rule of court, and an award is made, a new trial cannot in such case be granted.

*b* In an action on note, the defendant pleaded usury in bar, which being decided against him, he petitioned for new trial, on the ground of mispleading, and stated that he ought to have filed a complaint in equity. The court of common pleas granted a new trial, and on a hearing expunged the interest of the note, but on writ of error the judgment was reversed, because the court had no right when a defendant had elected to place his defence upon a direct charge of usury, to permit him to resort to a bill in equity, and which would not according to the statute, be filed on the second day of the sitting of the court.

Whenever it is apparent on the face of a petition, that there are no sufficient reasons for granting a new trial, the respondent may plead in abatement, which is in the nature of a demurrer: so he may plead any other proper matter in abatement, as want of service.

If the plea in abatement is over ruled, or if none be offered, it is the practice to proceed to the hearing of the petition, on the merits, without any plea or answer on the part of the respondent.

A court should never grant a new trial, when it appears that substantial justice was done in the former trial, nor should they grant

grant a new trial upon a strict rigid construction of the law, contrary to the apparent equity of the case. No time is limited within which new trials may be granted, and they are always granted after judgment has been rendered. Which is contrary to the British practice, where new trials are usually granted on motion after verdict, and before judgment, and commonly because the verdict is against law or evidence, or the damages unreasonable, or excessive, or where the judge has misdirected the jury.

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CHAPTER TWENTY-THIRD.

OF WRITS OF AUDITA QUERELA, AND WRITS OF ERROR.

AN audita querela, is where a defendant against whom judgment is recovered, and who is therefore in danger of execution, or perhaps in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff has given him a general release, or if the defendant has paid the debt to the plaintiff, without procuring satisfaction to be entered of record, or to be indorsed on the execution. In these, and like cases, where the defendant has good matter to plead, and has had no opportunity, an audita querela lies in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It also lies for bail when judgment is against them by *scire facias*, to answer the debt of the principal, and it happens afterward, that the original judgment against the principal is reversed; for here the bail after judgment had against them have no opportunity to plead this special matter, and therefore they shall have redress by audita querela.

Where actions are brought on joint contracts against several defendants, part living in this state, and part in some other, notice to those who live in this state is sufficient to bring the action to trial, and those who live out of the state, if injured, may be relieved by audita querela.

This writ is not a matter of course. It can be granted only by

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the court who rendered the judgment, if in session, and if not, by the chief judge of the court ; and in all instances, the court are bound to enquire, and see if there are good grounds to grant the same, which must be signed by the chief judge. The writ contains the substance of the complaint, and a command for the party to appear before the court at the next stated term. If the execution on the original judgment be not levied, this writ will be a *superfedeas*. If the parties appear, they may proceed to trial of the question in dispute, in the same manner as in other actions. If the execution has been levied and collected, and the plaintiff prevails in the action, he will recover all his damages : if the execution has not been levied, and the plaintiff does not prevail, then the execution will remain in force, and may be collected, but if the plaintiff prevails, then the execution will be declared and adjudged to be void, and he will recover his cost.

Writs of error, lie from the judgments of assistants and justices of the peace, of city courts, and courts of common pleas, to the superior court ; and from the superior court, to the supreme court of errors. All writs of error are limited to be brought within three years, from the time of rendering judgment. I shall treat of the subject, under the following divisions.

1. In what cases Writ of Error will lie.
  2. Of the manner of bringing a Writ of Error.
  3. Of the assignment of Errors.
  4. Of the defence that may be made by the defendant in Error.
  5. Of the judgment that may be rendered on a Writ of Error.
1. In what cases Writs of Error will lie.

Writs of error will lie in all cases for any error or mistake in the judgment of the court, apparent upon the record. In all cases of demurrers in the course of the pleadings, and where facts are conceded, so that the question of law arising thereon can appear to the court, error will lie. If the court render an improper judgment on a verdict, motion in arrest, or on default, or *nihil dicit*, error will lie ; for they must not only render the judgment according to the legal operation of the facts that appear, but it must be in due and proper form.

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Where an issue in fact is tried by the court, and there is any defect in the declaration or pleadings, which might have been taken advantage of under a motion in arrest, error will lie; but in the case of issues in fact tried by courts or juries, let the judgment be ever so erroneous, error will not lie, because the facts appeared in evidence only, and not on record. Some attempts have been made to bring up the whole case by stating all the facts in a bill of exceptions after verdict, but the courts have refused to sanction the practice.

In all the cases above mentioned, writs of error are brought for a mistake in the judgment of the court, with respect to the law arising on the facts conceded by the parties, and appearing in the pleadings. There are some cases however in which this writ will lie, for errors in fact not appearing of record: but this can be only in certain cases, where the party had no capacity or opportunity to take advantage of them upon trial. As where an action is brought against a married woman, as tho she was single, or a minor as being of full age, and judgment is rendered on default, or where an action is brought against a person, described to live out of the state, or if the person live in the state, and is absent at the time of service of the writ, and does not return before the sitting of the court, and judgment is rendered against them the first term, error will lie: and these facts may be stated as the grounds. In these cases, the married woman had no power to appear, and make a separate defence from her husband: the minor had no capacity to appear and defend without a guardian, and the absent defendants had no opportunity to make defence; but for matters of fact that come before the court in evidence, or which the party might have advantage of on trial, not being prevented by any legal incapacity, or want of opportunity, no writ of error will lie.

Writs of error will lie upon matters stated in bills of exception. These were introduced into England by statute, but in this state, they depend on the authority of the adjudications and practice of the courts of law. They are calculated to lay a foundation to revise the judgment of courts respecting the law, arising upon facts not apparent of record. By the practice in England, a bill of exception

cannot begin to be open late points of law, either by admitting ordering of evidence or a bill of exceptions, or the nature of the law, or upon a fact not denied in which either party is interested by the court. It is evident that the objection by a fault in the trial before a higher court, the judgment of a court upon some collateral point, as it turns up in the course of the trial, and of course that they cannot be allowed with respect to the general merits of the question. \* Our courts have allowed them in cases which respected the admission of evidence, † and a fact in a case where both parties did not appear on the first day of the term, and on the second day the plaintiff appeared, and revived the action, without the consent and knowledge of the defendant, who being returned of it appeared and objected to it, and lodged his bill of exceptions on file, which was certified by the judge. Judgment was afterwards rendered on ninth day, and on writ of error was reversed for the facts stated in the bill of exceptions. ‡ But in a case where a writ of error was founded upon a bill of exceptions containing a general stating of the facts and arguments in the cause, drawn up after verdict and judgment, the court upon a plea in abatement, dismissed it because a bill of exceptions taking up the whole cause is inadmissible, and no legal foundation for a writ of error.

A bill of exceptions must contain a true stating of the facts, and then the judge is bound to sign it, and permit it to be lodged on file: but if the facts are not truly stated, the judge is not bound to sign it. § Where manifest and material error shall appear of record in any judgment, or decree given in any suit for relief in equity, the party aggrieved may be relieved by writ of error, in the same manner as in proceedings at law.

## 2. Of the manner of bringing a Writ of Error.

A writ of error contains a command or summons to the party, to appear before the court, to hear read the files and records of the court whose judgment is complained of as erroneous, and to do what shall be enjoined by the court. The writ contains a recital of.

\* Kirb, 168. † Ibid. 361. ‡ Ibid. 416.

§ Rule of court established by the superior court, 1795. The party intending to file a bill of exceptions, must give notice of it before the cause is committed to the jury or the court, and the bill must be filed within twenty-four hours after verdict is recorded, and in trials by the court, within twenty-four hours after judgment and before the court rises.

¶ Statutes, 31.

of the declaration, the pleadings, the judgment of the court, and an assignment of errors. It must be signed by one of the judges of the court to which it is returnable, and served in the same manner as other writs. It is a judicial writ, and the judge is not bound to sign it of course, but will examine if there be probable foundation for error : if it appear that the nature of the trial was such, that error can be predicated upon the proceedings, it is sufficient to justify a judge in signing the writ. / He must take good and sufficient bond with surety, that the plaintiff in error, shall prosecute his writ to effect, and answer all damages in case he fail to make his plea good.

The parties to the original suit must bring this writ, and if dead their executors or administrator. A writ of error may contain a supersedeas to the execution, if not levied, and which ought to be expressed in the writ.

### 3. Of the assignment of Errors.

A general assignment of errors will be sufficient, as the whole record comes up before the court, they will examine and look through the whole, and if any error appears, they will reverse the judgment. The usual practice is, however, to make a special assignment of errors : but if the plaintiff should especially assign for error, what is not erroneous, and omit to assign the real errors, yet the court will reverse the judgment, for errors not assigned, being apparent of record. \* The plaintiff cannot assign error in fact, and error in law together, for these are distinct things, and require different trials ; \* but if such assignment of error be made, the defendant if he means to take advantage of it must do it by way of abatement : for if he plead nothing erroneous, it is a confession of the error in fact, and the judgment must be reversed if the facts are material. If an error in fact be well assigned, the plea of nothing erroneous confesses it to be true, but if it be ill assigned, such plea is no confession. ° Where the plaintiff assigns errors in fact, not properly assignable in error, together with sufficient errors in law, such errors in fact will not abate the writ.

Nothing can be assigned for error which contradicts the record

1 Statutes, 443.    \* Roll. Abr. 761.    n Salk 263.    ° Raym. 236.  
p Roll. Abr. 757.



confessed to the defendant in error upon a note for the sum of twenty-seven pounds, before a justice of the peace, who discovering it to be above his jurisdiction, made up two judgments upon two countesses, one for twenty pounds, and the other for the residue: here the averment of the fact contradicts the record, and therefore is not admissible. ¶ The plaintiff cannot assign a matter in error to procure a reversal of a judgment, which was for his own advantage; but if the error be by default of the court, tho' for the advantage of the party, he may assign it; for the course of the court ought to be pursued.

• A man shall never assign that for error, which he might have taken advantage of by plea in abatement, for it shall be accounted his folly to neglect the proper time of taking the exception. As if a married woman brings an action in her own name, and the defendant pleads in bar to the action, he shall never afterwards assign the marriage for error.

#### 4. Of the defence that may be made by the defendant in Error.

The defendant may plead in abatement, if the writ of error is not properly brought and served, or if there be an assignment of error in fact and law together. If the assignment of errors contains error in fact only, the fact may be denied, and an issue closed and tried by witnesses in the usual form. If the fact assigned be insufficient, the defendant may plead nothing erroneous, and which is always the proper plea to errors in law. The defendant may plead a release of all errors, or a discharge of all actions, or any act of the plaintiff, by which he is exonerated from all demands on account of the erroneous judgment.

¶ As to the amendment of judgments on which writs of error are brought, it would seem reasonable that where a justice should mistake in giving a copy of a judgment that it might be rectified, and made according to the judgment, but where he has made an irregular, informal, or improper judgment, on which writ of error is brought, it would seem that he ought not to alter such judgment;

and  
¶ 5 Co 39. • Carth. 124. ¶ Leavenworth vs. Tomlinson, S. C. 1792.  
Nichols vs. Benedict, 1791.

and on motion in such cases, to permit the justice to come in and amend a judgment, the court have refused unless there is something to amend by ; for it would be dangerous to suffer courts to mend their records, by memory after the term is over.

5. Of the judgment that may be rendered on a Writ of Error.

It is enacted by statute—that when on any writ of error, that shall be brought before the superior court, the defendant in such writ of error shall recover judgment, that the judgment complained of is not erroneous, he shall recover cost against the plaintiff : but if on such trial it shall be determined, that the judgment complained of is erroneous, judgment shall be given for the reversal of such erroneous judgment, and the plaintiff shall recover all that he hath been damnified thereby, but no cost in that case shall be taxed for either party.

That when any judgment in a civil action shall be reversed as aforesaid, the plaintiff in the original action on which such erroneous judgment was given, may enter his action in the superior court, paying the same fees, as if he had brought it by appeal, and the said court shall proceed to try said action, as if it had or could have been brought there by appeal : and the whole cost in said action, (excepting the cost on the writ of error) shall be allowed, and taxed in favour of him, who shall recover final judgment.

In all cases of the reversal of a judgment, if the action be not entered anew in the superior court for trial, the rule of damages to be allowed to the plaintiff, will be the cost he ought to have recovered in the courts below : if any thing has been paid by him on such erroneous judgment, then he will be allowed in damages such sums as he has paid : but if the erroneous judgment has not been paid, no damages will be allowed on that account, because it is vacated.

Where the action is entered anew in the superior court, then no damages are to be allowed on the reversal, unless the erroneous judgment has been satisfied, in which case the sum paid is to be allowed as damages : but the plaintiff in error cannot be allowed

any.

any damages, for cost that he ought to have recovered in the suit, because the cost must await the final issue of the action.

As no action can be entered anew in the supreme court of errors, and as the statute has made no express provision, the court have adopted the general rule, that in all cases of the reversal of the judgment of the superior court, under such circumstances, that the party might have entered his action anew, if it had been in the superior court, then the supreme court of errors will transmit such case to the superior court, who upon the entry of the action there, will proceed to the trial in the same manner as on entry after reversal in that court.

\* By the practice and adjudications of our courts, judgments may be affirmed in part, and reversed in part. Thus where an action of trespass was brought against several adults and minors, the minors made default of appearance, and notice of their minority not being given to the court, no guardian was assigned. Verdict was found against the adults, and one entire judgment rendered against the whole. Writ of error, was brought on the judgment, and the minority of part of the plaintiff's in error, the original defendants, was assigned for error, the court reversed the judgment as it respected the minors, and affirmed it as it respected the adults.

Where judgment is erroneous as to cost only, it may be reversed as to the cost only, and affirmed as to the debt or damage.

† Upon the affirmance of any judgment or decree, or upon a nonsuit, or withdraw made by the plaintiff in error, the court may according to their discretion adjudge and decree to the defendant in error, besides his cost, the interest of the money delayed, by such writ of error, and grant execution accordingly.

#### CHAPTER TWENTY-FOURTH.

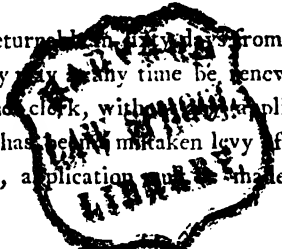
##### OF EXECUTION AND ITS CONSEQUENCES.

**I**F the judgment be not suspended, reversed, or set aside, for some of the foregoing reasons, or rather when the cause has come to a termination, and final judgment is rendered, execution must issue.  
When

\* Kirb. 114.

† Statutes, 443.

When the judgment is against any person in his private capacity, for debt, damage or cost, execution is issued against his estate, both real and personal, and for want thereof against his body. If judgment be rendered in an action of disseisin, to recover possession of certain demanded premises, then in addition to the execution for the damages and cost, there is also a command to cause the plaintiff to be seized and put in possession of the described premises. If judgment be rendered against an executor or administrator, for the debt of the deceased, then execution goes only against the estate of the deceased in their hands. These are all the executions which are known to our law. They are to be directed to the sheriff, or his deputy, or to the constables of towns.— Every court may direct an execution to any officer in the state.

Executions are made returnable,  from the date, or to the next court. They may at any time be renewed, or alias executions granted by the clerk, without any application to the court. But where there has been a mistaken levy of an execution and it is indorced satisfied, application must be made to the court for an alias execution.

If the officer does not serve and return them within that time, he is liable to the creditor : but if he collects and pays the money, or by direction of the creditor levies on land, tho he does not return the execution within that time, yet if in case of a levy on land, the return is made before action brought, so that the title of the land vests in the creditor, no action will lie against the officer : and where the money is collected and paid, no action can ever lie for not returning the execution.

When the execution is to put the person in whose favour it is issued, into possession of lands and buildings, the officer may justify breaking doors, if he be denied entrance, and may by force turn the person out of possession, who has been adjudged to have no right, and may put the person in whose favour the execution is, into compleat possession : for this power is necessary in order fully to execute the judgment of the court.

When an execution is against the estate of some deceased person, in the hands of his executors or administrators, if such estate cannot be found, the officer must make return of non est inventus, which lays the foundation for a scire facias : but if such estate can be found, it may be levied upon, and disposed of in due and usual form of law.

When the execution issues against the estate and body of the debtor, the law requires the officer to whom the execution is delivered, to repair to the usual place of abode of the debtor, if in his precincts, and make demand of the money. On refusal, or neglect of payment, he may levy upon any of the personal estate of the debtor, excepting necessary apparel, bedding, tools, arms, or implements of his household, necessary for upholding his life, and on such goods also, if they shall be presented by the debtor. An account of the articles of personal estate, thus taken, must be set up on the sign-post in the town where taken, and notice thereby given, that they will be sold at the end of twenty days at public vendue : when they shall be sold at the beat of the drum to the highest bidder, to a sufficient amount to pay the debt and cost, and if there be any overplus, it shall be returned to the owner of the estate. \* But when an officer can find money belonging to a debtor, he may take it, and apply it in payment of the execution.

If the officer levy on estate not belonging to the debtor, he is liable to the owner. If the creditor turns it out to him, as the estate of debtor, when it is not, he will be responsible for the damages to the officer. If the officer does not take by his first levy, sufficient estate to satisfy the execution, he may levy again, and thus till the execution be satisfied : but if he once levies on estate, and does not take sufficient, and afterwards can find no more estate, he becomes responsible to the creditor for the whole sum of the execution, unless there be some special agreement to save him, or he levies upon the body of the debtor, within the life of the execution, and commits him to goal. It therefore behoves an officer, when he levies on personal estate, to be careful to take sufficient when it can be found, and if he cannot find sufficient, then either to have the special direction of the creditor, or to levy upon the body of the debtor.

If

\* Brooks vs. Thompson, S. C. 1790.

If personal estate can be had, the officer is bound to take it, and cannot levy upon the body, without being guilty of false imprisonment. He cannot require the creditor to turn it out, or shew it to him, but if he can find it, tho prohibited to levy upon it, he is bound to do it, and not levy on the body. But it must be in his power to take sufficient estate, to satisfy the execution, and his cost, and the value is to be estimated according to the usual and probable price for which such estate will sell at the post, for ready money. The officer must also have reasonable ground to believe, that the estate found or offered, belongs to the debtor, and where the matter is doubtful, he is not obliged to levy on the estate. But in these cases, the officer is bound to act fairly, and impartially. If he has good reason to think that the estate would be insufficient, or that it did not belong to the debtor, tho it should appear afterwards probable, that it might have been sufficient, or if it should turn out to be the estate of the debtor, yet in an action for false imprisonment for levying on the body in such cases, the officer ought not to be subjected to pay damages : for in such cases he is by law placed in a situation, where he is bound to judge with respect to facts, according to probable circumstances, without having it in his power to acquire positive proof : and if he levies on estate insufficient to pay the execution, or which is not the property of the debtor, he is liable to pay the whole execution. Therefore where he conducts fairly, impartially, and honestly, he ought not to be punished for a mistake in judging, in a case where the law requires him to judge : but if he refuses to take estate manifestly sufficient to satisfy the execution, and which he has good reason to believe belongs to the debtor, and levies on his body, he ought to be subjected to the payment of damages, in an action for the false imprisonment.

An officer may not break open the debtor's house to levy upon his goods : but this privilege extends only to the house of the debtor himself, for if any person have in his house the goods of another, against whom there is an execution, the officer who has the same in his hands, may, after demand of entrance, and refusal of admission, break open, and enter the house to levy upon such goods. So if an officer be within the house, he may break open an inner-door, or chest, or trunk, to gain possession of the estate of a person against

against whom he has an execution. If a person has the estate of another, confined in a chest, or trunk, and refuses to open it on request, an officer who has an execution against the owner of the estate, may break it, for the purpose of levying upon such estate.

If personal estate cannot be found, the creditor may if he pleases, levy upon the lands of the debtor. This is altogether optional with the creditor, and the officer has no right to levy on lands, tho mentioned in the execution, without his express direction. The mode of levying has already been pointed out, in treating of title to real estate by execution.

But if personal estate is not to be found, and the creditor refuses to take real estate, or if there is none to be had, then the officer is bound and warranted to levy upon the body of a debtor, arrest him, and commit him to goal. But after the levy of an execution upon the body of a debtor, if he shew and tender to the officer, sufficient personal estate to satisfy the same, he is bound to release the body, and levy on the estate. So if the officer can find sufficient personal estate, he may release the body and levy on the estate.

To compleat the levy of an execution upon the body of the debtor, or to make an arrest, it is necessary that there should be an actual touching of the person, for no words will amount to an arrest; but if after the officer has notified the debtor, that he has an execution against him, and says to him you are my prisoner, he voluntarily submits to the officer, this will be deemed an arrest: but if he runs from him, this will be no arrest. The sheriff, and other officers, have power to command as many persons as are necessary, to assist in apprehending, keeping, and carrying any person to goal: which persons commanded by the officer to assist, are liable to certain penalties for disobedience, and if they suffer an escape of the prisoner, are liable to the officer. If great opposition is made, the sheriff or constables may raise the power of the county, consisting in the militia; and as the law has invested them with full power to do execution, they shall not return, that they cannot do execution.

<sup>a</sup> But an officer in order to do execution, may not break open the outer door, or windows of a house: for the law considers every

ry man's house to be his castle and place of security, into which no person may enter without his consent, and that it is better that the judgments of courts should remain unexecuted, than it is to suffer a forcible invasion of the peace, and repose of private families: but if the officer has once passed the outer door, and has obtained entrance into the house, he may break open any inner door, for the purpose of making an arrest. The reason of this distinction seems to be this, that it might be attended with dangerous consequences to suffer the breaking open an outer door or window, as it might expose the family and let in thieves and robbers: but when the officer has once gained entrance, it is evident that the debtor has not claimed that security for his family; and the opening of inner doors will not expose him to such inconveniences, as are to be apprehended from opening outer doors.

*b* It has been determined, that where a person takes separate lodgings in an inner room of a house, the door that goes into such separate apartment, is not privileged from being broken, and that let there be ever so many separate apartments and lodgings in a house, tho' occupied by different families, yet none but the outer door is privileged.

When an officer has legally arrested a person, and he makes a forcible escape, the officer may pursue him, and for the purpose of retaking him, has a right to break open doors, wherever he may conceal or secure himself, for when a man is lawfully arrested and forcibly escapes, he cannot be privileged from recaption.

*c* The dwelling house and adjoining out houses are privileged from being broken open by an officer, but the door of a barn, standing at a distance from the house, may be broken open, without requesting the owner to open it, in the same manner as the officer may enter a close.

*d* If an officer enter a house, the door being open, and the owner locks him in, he may break open the door to get out. So if any of the sheriff's deputies having entered a door, should be locked in, the sheriff may justify opening the door to enlarge, and set them at liberty. If an officer in executing a writ, breaks open

*b* Cowp. 1.    *c* 2 Bac. Abr. 367.    *d* 2 Bac. Abr. 368.



a door where he has no right, yet the execution is good, and the party has no remedy but by action of trespass against the officer.

When an officer has arrested a person, he is bound to keep him in close and safe custody, and convey him to goal, as soon as convenient in the most direct manner : but any reasonable act of delay and indulgence, exercised by the officer, will not subject him to an action, provided the debtor be committed to goal in the life of the execution. If the officer suffers an escape, an action lies against him, or if the prisoner be rescued, an action lies in his favour against the rescuers : which has already been considered. The prisoner must be committed to goal, and a copy of the execution, with an indorsement of the commitment by the officer, is a sufficient warrant for the goal keeper to hold him.

The law respecting goals, and the responsibility in cases of escapes, was considered when we treated of counties.

Every debtor committed on mesne process, or execution, is bound to support himself, and the goal-keeper is not chargeable with his support : but if he is poor, and unable to pay the debt, or not worth five pounds, our law is so humane and indulgent, as to provide for his relief and support, so as to prevent him from suffering for the want of necessary food. Such poor debtor may make application to an assize or justice of the peace in the county, to take the oath by law provided for poor prisoners, and such authority, upon giving four days notice to the creditor, if living within this state, or to his attorney, if not an inhabitant of this state, may proceed to enquire whether the applicant is entitled to take the oath. The creditor has a right to appear and object, and if he can shew that the debtor has estate to a greater amount than five pounds, or more than enough to pay the debt, where it is less than five pounds, the oath cannot be administered : but if it appear that the debtor is not worth five pounds, or sufficient to pay the demand, then the court must administer the oath prescribed by the statute. If a single minister of justice, admits the debtor to take the oath, the creditor may lodge money with the prison-keeper for his support, and then apply to the judge of the county court and a justice of the quorum, or justice of the peace, or to two justices

justices of the quorum, or one justice of the quorum and one justice of the peace in the county, ~~who~~ have power to review the sentence of the single minister of justice, and if they shall be of opinion that such debtor has not by law a right to take the poor debtor's oath, they may order such support to cease. When a single minister of justice, refuses to administer the oath, the debtor may apply in the same manner, as the creditor, which is in the nature of an appeal: but he cannot apply to another justice of the peace. On such application of the debtor, the former sentence may be reviewed, and if such authority are of opinion that the applicant is entitled to take the poor prisoner's oath, they may administer the same.

When the poor debtor has taken the oath, he must be dismissed by the goal-keeper, unless the creditor lodges money for his support; which sum is determined by the court of common pleas in the county. <sup>e</sup> The money for the weekly allowance of a prisoner is to be lodged with the goal-keeper, who becomes chargeable to the creditor for the safe keeping of the prisoner, and accountable to the prisoner for his support. As to the time when the debtor may be said to be without support from the creditor, so that he may depart from the goal, <sup>f</sup> it has been decided, where a debtor took the oath fifty-two minutes after two o'clock, and money was left to include his dinner on another day, on which day, after eating his dinner, at three o'clock, there being no more money left, he departed from the prison, and the creditor lodging money with the goaler, within five minutes after he left the prison that this was an escape: for the court said, that the law must have a reasonable construction, it was made for the relief of poor imprisoned debtors, and not to injure the honest creditor; that the object of the law is the subsistence of the debtor, and that it could with no propriety be said he was without subsistence till the dinner he had just eaten was digested, and besides, if the goaler provides for the prisoner on the credit of the plaintiff, the end of the law ~~is~~ answered and it is nothing to the debtor.

<sup>g</sup> In an action upon a bond, conditioned that a certain debtor should abide a faithful prisoner, the defendants pleaded in bar that the oath

was

<sup>e</sup> *Parsons vs. Whitmore*, S. C. 1789.     <sup>f</sup> *Fitch vs. Scot & Upton*, S. C. 1791.  
<sup>g</sup> *Fitch vs. Cook*, S. C. 1791.

was administered to the debtor on a certain day, between half past four and half past five o'clock, that money was lodged for twenty weeks, that he staid in goal till twenty minutes past six o'clock, and supped at his own expence, on the the last day for which the money was lodged; that the money was all expended and none left for his support. The plaintiff replied, that the oath was administered between twenty minutes after six, and seven o'clock, that twenty minutes after six money was lodged, that the debtor continued in goal till the next day, and traversed that the oath was administered between the hours of half past four and half past five o'clock. On this, issue was joined and found by the jury for the defendants, but on motion, the plaintiff had judgment, because it appeared from the plea in bar, that the debtor went out twenty minutes after six, which was too soon: and from the reply, that money was left twenty minutes after six, before he went out, in either of which cases, it was an escape, and the issue immaterial.

In case no money is lodged, and the debtor is dismissed, when he was committed on mesne process, or attachment, he may if judgment is rendered against him, be taken by the execution, and re-committed. But if he takes the poor debtor's oath, when committed in execution, the body cannot afterwards be taken on the execution; but if he should acquire property, the judgment may be revived upon proper application to a court, and his property subjected to the payment of the debt. The creditor may lodge money with the goal keeper for the support of such debtor, and keep him in goal as long as he pleases to lodge money for his support.

But when a debtor has taken the poor prisoner's oath, or has no visible means of paying the debt, for which he was committed, the law has made provision for his assignment in service in satisfaction of it—which is the ultimate act which the law can exert in enforcing the payment of a debt.

ADDITION TO CHAPTER TWENTY-THIRD—ON TRIAL.

IN respect of the compulsion of witnesses to appear in court, and testify, it may be observed, that courts of law on application, where the appearance of a witness cannot otherwise be obtained, may issue a warrant, and bring him before the court to testify, as well in civil as in criminal cases : for instances may happen, where a witness refuses to appear, when the cause is of such a nature, that no pecuniary compensation can be adequate to the injury sustained by want of his testimony ; and there may be instances where a witness is a bankrupt, and wholly unable to pay the damages to which he may be subjected.

When an objection is made to a witness, on the ground of interest, the objector may prove the fact, by other witnesses, he may challenge him upon the voir dire oath, or he may permit him to be sworn in the usual manner, and then examine him with respect to his interest, and if his interest appears, he may be rejected ; but a party cannot pursue but one of these modes with regard to one witness, and when he has elected one mode, and the matter is determined against him, he cannot resort to another. \* Thus if the objector fails to prove the fact by indifferent testimony ; yet if after the witness is sworn, it appears from his own testimony, that he is interested, he cannot be rejected, and his interest only goes to his credibility.

ADDITION TO CHAPTER SEVENTEENTH.—ACTIONS ON STATUTES.

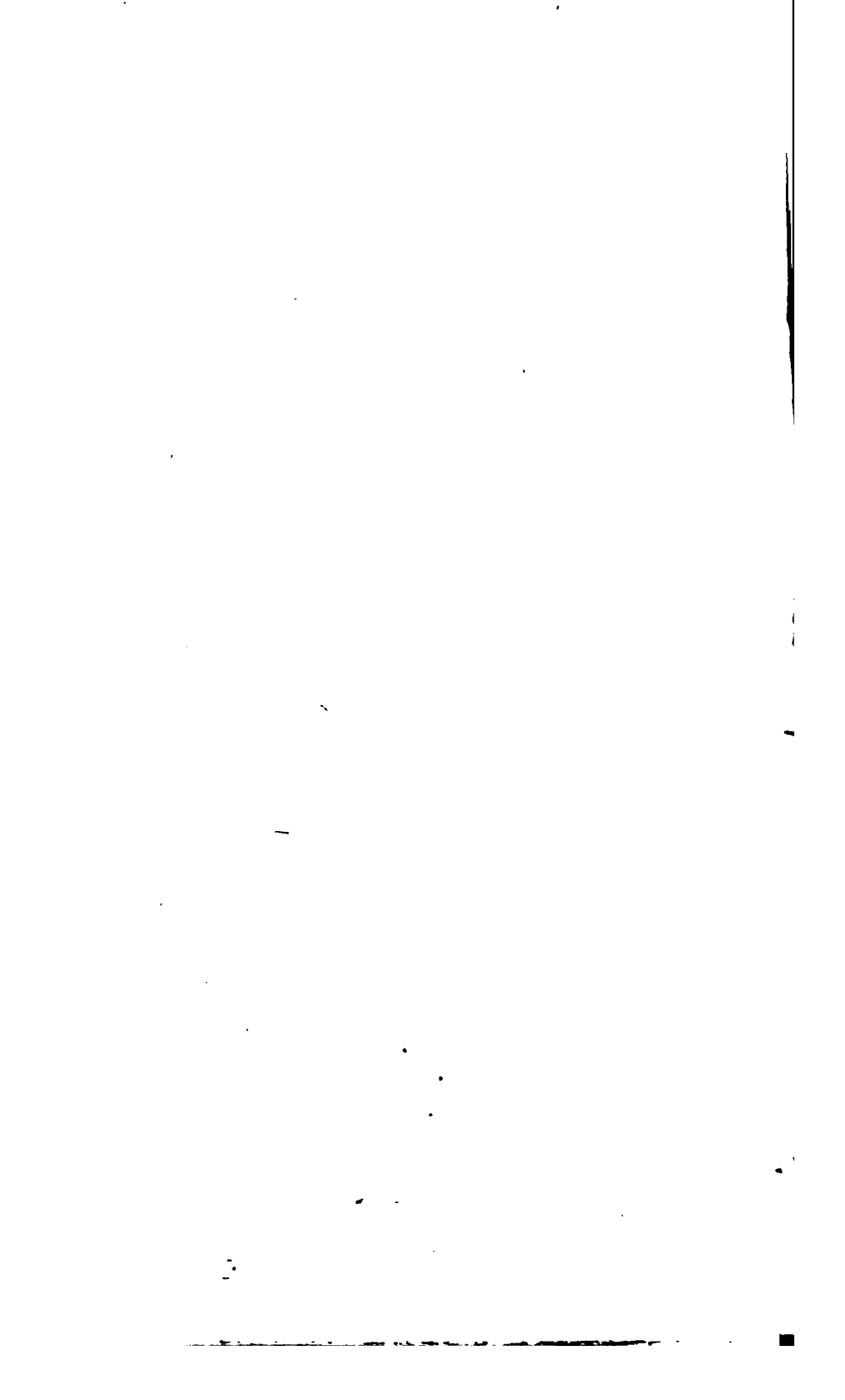
WHERE a statute inflicts a penalty of a certain sum each month, as in the case of executors neglecting to prove a will, the informer cannot accumulate the penalties of several months, and recover the whole in one action ; but only the forfeiture of one month can be sued for and recovered at a time. They being considered as a stimulus to duty.

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\* Coit vs. Bishop, S. C. 1795.

† Barber vs. Eno, S. C. 1794.



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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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## BOOK FIFTH.

### Of Crimes and Punishments.

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#### CHAPTER FIRST.

##### GENERAL OBSERVATIONS RESPECTING CRIMES.

**I**N the preceeding Book we have treated at large of legal remedies for civil injuries. We now come to handle the important, and interesting subject of crimes, and punishments.

A crime may be defined to be an act, committed or omitted, in violation of a public law, that either forbids, or commands it. A punishment is some pain or penalty inflicted on a criminal, by the judgment, and command of some lawful court, for the purpose of correcting and amending him, and preventing him from the commission of like crimes in future : and likewise for the purpose of operating as a public example to mankind in general, in order to deter them from the practice of similar crimes, by the dread of similar punishments. A misdemeanor is synonymous with crime ; but when crimes and misdemeanors are mentioned together, it is commonly understood that the first relate to higher, and the last to lower offences.

The object of the institution of society, is to preserve to individuals certain private social rights, and to restrain those acts, which disturb the peace, interrupt the happiness, and tend to the dissolution of government. As mankind united in society for that purpose,

pose, this must be the leading principle of all laws, which restrain their conduct. Those acts which violate the rights of individuals, are private wrongs : and those which affect the general welfare, are public crimes. The same acts will generally constitute a private injury, as well as a public crime. A public punishment is inflicted on the part of the state, to restrain such conduct, and the party injured is entitled to a compensation for the injury he has sustained. If one man assaults and beats another, he is punished by a fine for disturbing the peace, and compelled to compensate in money the person he has abused and wounded. All public crimes therefore are considered and estimated as relative to the community at large, and private wrongs, as they affect individuals. If every man was allowed to kill, wound, or evilly treat his neighbour, and to take away and destroy his property at pleasure, it is apparent that it would not only destroy all private right, but dissolve the bands of society. It is therefore not only necessary that a compensation should be awarded to the person who has suffered the loss ; but that the collected strength of the community should be exerted, to prevent those acts which endanger its existence.

As human laws are founded upon political considerations, legislators have not deemed themselves to be bound solely by the moral law in enacting their codes. It has never, however, been adopted as a maxim, that they may require acts to be done, which are forbidden by the law of nature : but the great rule is, that they are not bound to punish all the infractions of natural law ; that they may never infringe that law ; that they may prohibit under civil pains and penalties, not only those acts, which are repugnant to natural law ; but that they may also restrain the conduct of the members of the community, in those points, which are indifferent as it regards natural law, for the purpose of promoting the political welfare of the state. Hence we find a division of public crimes, into those which are *mala in se*, wrong in their own nature, that is, morally wrong : and those which are *mala prohibita*, wrong because they are prohibited, that is, politically wrong. Under the first division is comprehended those acts, which are prohibited by the law of nature, as well as the law of society,—such as murder, robbery, theft, adultery, and the like : and the latter are such as are  
not

law of society on political considerations,—such are the laws respecting taverns, and the like.

In this point of view, crimes are contemplated by a human tribunal. The subject of punishment merits a particular investigation. My limits confine me to a few general observations. It is a fundamental principle, *that the sole end of punishment is the prevention of crimes, and that every punishment ought to be proportioned to the offence.* It has been ascertained by experience, that mildness of punishment is better calculated to prevent crimes, than severity. Where the laws are sanguinary, and disproportionate, informing officers will be unwilling to prosecute, and jurors will be unwilling to convict : and if an offender should be so unfortunate as to be convicted, he will stand a chance to be deemed a proper object of pardon. The prospect of escaping the punishment, will diminish its terrors, in the eyes of a criminal. But when the punishment is mild, and proportionate to the offence, every person will combine in the punishment of the offender, and a mild punishment when it is certain that it will be inflicted, will operate with far greater force to deter from the commission of crimes, than severe punishments, where it is uncertain whether they will be inflicted, and the offender has a variety of chances to escape.

In countries where the laws are sanguinary, if they are rigorously executed, the frequency of the punishment, often renders the object so familiar and common, as to disarm it of its terror. In England there are one hundred and seventy-six crimes punishable with death, without benefit of clergy, and sixty-five where the benefit of clergy is allowed : yet in no country are crimes more frequent, and more persons suffer there by the hands of the executioner, than in all the civilized world besides. <sup>a</sup> So frequent and common are executions in England, and especially in London, that the people behold them without any emotions of horror, or compassion ; and there are many instances where the same crime is perpetrated under the gallows, for which the criminal is hanging. But in all countries where the punishment of death is rarely inflicted, no language can describe the horror which it impresses on the minds of the surrounding spectators.

<sup>a</sup> Windelborn's View of England, 56,



In all countries where punishments have been mild and proportioned to offences, it has been demonstrated by experience that fewer crimes are committed. Instead then of inflicting death upon the greater part of crimes, *confinement to hard labour and coarse fare* has been substituted. The certainty and long continuance of such a punishment, will more effectually prevent crimes, than all the pains and terrors of death, under the usual prospect and hope of escape.

The example of the State of Pennsylvania, ought to be mentioned to their honour. It is worthy the attention of every philosopher, and ought to be imitated by every government. They have substituted for all crimes excepting treason and murder in certain degrees, the punishment of *confinement to hard labour, and coarse fare*, instead of death. But it is in the mode of inflicting the punishment, in the government and discipline of the prison, that our greatest admiration is excited, and the cause of humanity most effectually served. In a building accommodated to that purpose, we behold the convicts performing the labour assigned them, with as much regularity and good order, as the same number of mechanics in a work shop. To stimulate them to be industrious, they are entitled to receive on their release, such sum as the value of their labour exceeds their cost and expense. In case of refractory behaviour during the period assigned for their punishment, they may be confined in the solitary mansions of a cell, till they will submit and conform to the regulations of the goal. They are secured and kept to labour without irons or shackles. Subject to no hardship, but confinement to labour and coarse fare, they in every other respect live in a comfortable manner, in convenient and healthy apartments. In the dreary walls of a prison, where criminals are constantly suffering punishment for the most atrocious offences, we see not the tears of anguish, nor hear the groans of despair; there are no marks of severity and cruelty. And yet, by this mild punishment, it is found, that crimes are more effectually restrained than by the awful punishment of death. But what is still more interesting to the feelings of humanity, the criminals are corrected, amended, and in some instances restored to society as reformed citizens. The world has never before witnessed such an example of benevolence,

benevolence, in the mode of punishing criminals, nor has punishment ever before produced such salutary effects. Compare the state of this prison, with the prisons of every kingdom in Europe, and it will reflect the highest honor, on the compassion and generosity of the authors of this goodly work, and confirm the hope, that in America, not only the form of government, but the administration of justice, will receive its last and greatest improvement. We read with admiration, the heroic achievements of an Alexander, a Cæsar, and a Frederic : but how much dearer to the heart of sensibility, is the character of the benevolent philosopher, who makes it the great object of his ambition, to introduce humanity within the walls of a prison ; who attempts to correct and amend offenders, by softening the pains of punishment : who instead of exterminating, aims to render them useful members of the community. The satisfaction of doing good, furnishes the richest reward to a generous mind ; but from the universal tribute of praise, rendered to the memory of the celebrated Howard, it is probable that the period is not remote, when great exertions in the cause of philanthropy and humanity, will acquire a more distinguished and lasting fame, than the most splendid enterprises of heroes and warriors.

In this state, before Montesquieu, and Beccaria, had immortalized their names in pleading the cause of humanity, the legislature had begun to practice upon the sublime principles, which these philosophers have recommended by all the charms of eloquence and power of reason. Our ancestors when they enacted their criminal code, were far from being disposed to adopt the sanguinary system of their native country. They exploded the idea of inflicting death, upon crimes of a very different nature. For a few of the most enormous crimes, the punishment was death, and for the rest, corporal pains, and pecuniary penalties were inflicted, according to the nature of the offence. But it was discovered that there were certain crimes to which the wicked and the indolent were tempted by so strong a desire to obtain property without labor or industry, that they could not be restrained by ordinary corporal and pecuniary punishments. Unwilling to introduce sanguinary punishments, the legislature adopted the principle of punishing a certain class of crimes, by confinement to hard labour and coarse fare. For this

this purpose, New-Gate prison was erected. The convicts are immured during the night in the dreary mansions of a profound cavern, to heighten the horror of the punishment, and to guard against the possibility of an escape. By day in an upper apartment, chained for their safe-keeping, they are compelled to perform such hard labour, as is most suitable for them.

The legislature have aimed to proportion the punishment, to the nature of the offence, and for that purpose have introduced three distinct grades of punishment,—*Death : Confinement to hard labor, and coarse fare : Corporal and pecuniary pains and penalties.* The crimes for which death is the punishment, are treason, murder, rape, the crime against nature, mayhem, and arson, where some life is endangered. Imprisonment in New-Gate is inflicted on robbery, burglary, forgery, counterfeiting, horse-stealing, arson, attempting to commit a rape, perjury, and aiding to escape from New-Gate prison. On all other crimes corporal and pecuniary punishments are inflicted.

The legislature have unquestionably adopted the three essential grades of punishment, but it is a serious question, whether in every instance, the punishment is proportioned to the crime. The dreadful punishment of death, ought only to be inflicted on those crimes which directly and immediately tend to the destruction of society and the human race, as treason, and murder. Those ought to be prevented by the most effectual measures ; and if death be inflicted on no other crimes, there is no probability that it will be so common as to be disarmed of its terrors. It will impress a certain awe and dread on the mind, that will in the most effectual manner possible, guard against the commission of those crimes ; but if they are punished only in the same manner, as crimes of an inferior degree, it will lead mankind to confound them together, and efface those peculiar sentiments of horror from the mind, which ought to be enforced.

But the other crimes punishable with death, by our law are certainly inferior to treason and murder, and of course may be prevented by a punishment less severe. Confinement to hard labor may be so varied in degree, as well as length of time, that it may be proportioned

proportioned to a vast variety of different crimes in such manner as to prevent their commission. Here is room for important improvement. This is the mode by which crimes are most effectually to be restrained.

This subject deserves the most attentive consideration of the jurist and the philosopher. I shall only remark, that the dreadful punishment of death ought only to be inflicted on treason and murder : that confinement to hard labour ought to be inflicted on those crimes, to which there is a strong temptation, which indicate great moral depravity, which are infamous, and are highly injurious to society ; that this ought to be varied according to the aggravations of the offence : and that for all inferior crimes, corporal pains and pecuniary penalties may be proportioned in such a manner as to subserve the interest of society : that corporal punishment is proper for those crimes which are infamous and bad in their own nature ; and pecuniary penalties are adapted to actions which are deemed crimes in a political point of view, and bad because they are prohibited.

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#### CHAPTER SECOND.

#### OF TREASON.

**I**N pursuing this branch of our enquiries, I shall begin with the highest, and descend to the lowest crimes, defining each in the concise manner, and ascertaining the punishment.

In almost all codes of criminal law, treason is a crime that comprehends a great variety of actions, and requires a long dissertation to explain it. But in this country, as we have no royal families, whose dignity is to be defended, and whose affronts are to be avenged, a short statute fully defines the crime and declares the punishment. It is only the majesty of the people, and the existence of the government, that are capable of being affected by this crime. The lives of the rulers are sufficiently guarded and protected by the same laws which protect every member of the community.

<sup>a</sup> The statute enacts, that all persons belonging to, or residing within this state, and under protection of its laws, who shall levy war against the state or government, or aid any enemies at open war against this State or the United States, by joining their armies, or enlisting, or procuring others to enlist for that purpose, or by furnishing arms, ammunition, provision, or any other articles for their aid or comfort, or by carrying on a correspondence with them, or shall form or be concerned in any combination, plot, or conspiracy, for the betraying this State or the United States, into the hands or power of the enemy, or shall give or attempt to give any intelligence to any enemy for that purpose, shall on conviction, suffer death. That all persons who shall endeavour to join the enemies of this or the United States, or use their influence to persuade any person to join, aid, or comfort them in any manner, or shall have knowledge of any person's endeavouring to do the same, and shall conceal it, shall be punished by fine, according to the nature of the offence, and be imprisoned at the discretion of the superior court, not exceeding ten years. That no person accused of this crime, and on examination before proper authority, shall be adjudged to be held to trial, shall have bail, unless before the court having final jurisdiction.

Since the passing this statute, the government of the United States has been established and a statute enacted, defining and punishing treason, which will supersede the necessity of the law of this state.

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### CHAPTER THIRD.

#### OF HOMICIDE.

**U**NDER this head, I shall treat of the crimes of murder and manslaughter. Their connexion is such as requires them to be considered together.

The Statute respecting murder enacts, <sup>b</sup> “ that if any person shall commit any wilful murder, upon malice, hatred or cruelty, not in a man's just and necessary defence, nor by casualty against his will, or shall slay or kill another through guile, or  
by

<sup>a</sup> Statutes. 257

<sup>b</sup> Statutes, 162.

“ by poisoning, or other such atrocious practices, he shall be put to death.” <sup>c</sup> The common law definition of murder is “ when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and in the public peace, with malice aforethought, either express or implied.” It is evident that the statute is made in affirmance of the common law. It is strange that the revisers of our statutes did not adopt the perspicuous and accurate language of the common law, in describing this offence.

The age and capacity of persons to commit this as well as other crimes will be considered hereafter. The person killed, to constitute murder must be actually in existence. <sup>d</sup> To kill a child in its mother's womb, is not murder, but a great misdemeanor, but if the child be born alive, and then die by reason of the injury it suffered in the womb, it will be murder in him who caused it. Every person who is in the state, is in the public peace, and of course protected in his life, excepting alien enemies at open war, and who enter the state with an armed force. In the repulsion of such invaders it is justifiable to kill them. But if an alien enemy comes into this state in a peaceable manner, without force, tho in the character of a spy, no person has a right to kill him, but may apprehend him for trial.

<sup>e</sup> There must be an actual killing: an assault with an intent to kill is a misdemeanour, but not murder. The modes of murder may be as various, as the possible means of taking away life, as by poisoning, striking, starving, drowning, or by an indirect act, of which the probable consequence may be, and actually is death. <sup>f</sup> If a man set a dog upon another, and the dog kills him, it is murder. If a man turns loose a beast, which he knows is used to do mischief, purposely, and he kills any person, it is murder. So where a son carried his sick father against his will, in a cold frosty season from town to town, by reason whereof he died, it was held to be murder. If a man lay poison to kill one, and another is killed by it, this is murder. <sup>g</sup> According to the common law, a person must die within a year and a day after the stroke was given, or cause of death was administered, to constitute the crime of murder, and that in the computation the whole day in which the fact

was

<sup>e</sup> 3 Inst. 47. <sup>d</sup> Black. Com. 195. <sup>d</sup> 3 Inst. 50. <sup>i</sup> Hawk. P. C. 80.  
<sup>4</sup> Black. Com. 198. <sup>e</sup> Ibid. 195. <sup>f</sup> 4 Black Com. 196, 197. <sup>i</sup> Hawk.  
 P. C. 78, 79. <sup>g</sup> Hawk. P. C. 79. H. P. C. 55.

was done shall be reckoned the first. *b* Malice prepense is the grand characteristic of this crime. This malice is not confined to the particular object, but where the conduct shows that depravity of mind, and wicked malignant heart, which evidences that the offender is capable of any mischief however dangerous to the community, it will be sufficient proof of malice prepense. This may be either express or implied. *i* Express malice is where the design is formed, and the act perpetrated in a deliberate manner. This may be determined by the attendant circumstances, as by lying in wait, former menaces and enmity; and concerted schemes to do some bodily injury, which clearly discover the intention to kill. *k* A duel will come within the description of deliberate murder. There are instances where there is no intent to kill, yet the act is accompanied by such express hatred, revenge, and cruelty, as to evidence a total depravity of heart, and constitute malice prepense. *l* Where a park-keeper tied a boy that was stealing wood, to a horse's tail, and dragged him along the park: a master corrected a servant with an iron bar; and a school-master stamped on a scholar's belly, so that the sufferers died, these acts were held to be murder. So where a person deliberately goes with a horse used to strike, or discharges a gun among a multitude of people, by which any are killed. Such acts demonstrate that wanton cruelty, and unfeeling barbarity, which render the perpetrators unfit and dangerous members of society.

*m* Where two, or more assemble for the purpose of doing an unlawful act against the peace, and of which the probable consequence may be bloodshed, as to beat a man, or commit a riot, and one of them kills a man, it is murder in all, because of the illegality of the act, and the premeditated wickedness of the design.

Implied malice must be deduced from the circumstances attending the fact. *n* Where a person upon little or no provocation, strikes another with a dangerous weapon, and kills him, the law implies malice prepense. There is considerable nicety in distinguishing between murder, and manslaughter, where the death ensues upon a sudden quarrel. Where on a sudden quarrel, and high provocation, a man is transported beyond himself, and in the paroxysm of anger intentionally

*b* 4 Black. Com. 198. *i* Ibid. 199. *l* Hal. P. C. 451. *k* 1 Hawk. P. C. 82.  
*l* 4 Black. Com. 199. *m* 1 Hawk. P. C. 74. *n* 4 Black. Com. 200.

intentionally kills a person, it is manslaughter. \* So where a person upon slight provocation beats another, with an intent to chastise him, and not kill him, and unfortunately kills him, it is manslaughter. These seem to be very reasonable allowances for the passions and failings of mankind. But if a man will rise into anger upon trifling provocations, as mere words and gestures, and intentionally kill his fellow-creature, or treat him with that cruelty, and barbarity, which produce his death, the law implies malice, and pronounces him a murderer : or if a person in a sudden affray, however abused, has the command of his temper, and deliberately and intentionally kills another, it is murder. If two have had a quarrel, and they separate, and have time to cool their passions, and then one kills the other, it is murder. † If a man kills a sheriff or other public officer, or any of his assistants in the execution of their duty, endeavouring to preserve the peace, or any private person endeavouring to suppress an affray, or apprehend a felon, knowing the authority or intention with which he interposes, the law implies malice, and the killer is guilty of murder. ‡ It is a principle of the common law, that where a man, intending to commit a felony, undesignedly kills a man, he is guilty of murder. If a man shoots at a one person, and missing him kills another, he is guilty of murder. If one lays poison to kill a man, and another by accident takes it, and dies, it is murder ; but if the poison be laid to kill rats, and a man takes it, and dies, it is not murder.

The statute has declared, that in the cases of just and necessary defence, and casualty, the killing of a man is not murder. Let us attend to these circumstances, and this will aid us in giving an accurate description of murder.

Justifiable homicide is where the act results from unavoidable necessity, without any will, intention, desire, inadvertence, or negligence, on the part of the killer. § As where an officer in the execution of a judgment of court, puts a malefactor to death ; or where an officer in the execution of his office, kills a person that assaults, or resists him. So where an officer, or a private person, endeavor to take a person, charged with some high crime, and are resisted, and in the attempt to take kill him, this is justifiable.

Where  
 \* Fort. 291. † H.J. P. C. 457. ‡ 4 Black. Com. 201. § Ibid 178.  
 § Hawk. P. C. 71.



where there is a riot, or rebellious assembly, and the peace officers endeavour to disperse them, and they refuse, it will be justifiable to kill them, if it be necessary for the purpose of executing the laws.

1 Homicide is justifiable for the preventing of any forcible and atrocious crime ; as an attempt to rob, to murder, to break open a house, or to burn it. But to prevent crimes not accompanied by force, to kill a person, could not be justifiable. It is justifiable for a woman to kill a man, who attempts to ravish her : and a husband or father may justify killing a man, who attempts to commit a rape upon his wife or daughter. And in all instances where the crime is capital, it is justifiable to prevent the commission of it, by killing the person attempting it.

\* Excusable homicide is by misadventure, or casualty, or in self-defence, upon the principle of self preservation. Homicide by misadventure, or casualty, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another : as where a man is cutting with an ax, and the head flies off, and kills a bystander : or where sundry persons are hunting, and one discharging his gun, undesignedly kills another. \* Where a parent moderately corrects his child, or master his scholar, and happen to occasion their death, it is only misadventure : but if they exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least ; and may according to the circumstances of the case be murder.

y Homicide in self-defence, or self-preservation, is one of the first laws of nature, which no man ever resigned upon entering into society. Whenever a person is assaulted by another, and he has no other mode to defend his life, he may kill the assailant. Here the law goes upon this principle, that a man may take away the life of another only when his own is in danger, and he has no other possible mode of defending himself. One may not kill another to defend himself from an assault. The law therefore requires that where a man is assaulted by another, he shall do every thing in his power to defend himself, and save his own life, without killing the assailant. He shall retreat as far as he can, till he be stopped by some fence, wall, or ditch, if the fierceness of the assailant will permit

1 4 Black Com. 180. \* 4 Black. Com. 182. § Hawk. P. C. 73, 74.  
Mal. P. C. 473. y 4 Black. Com. 184.

mit it : but when he can retreat no farther, or the fury of the assailant will not permit it, without manifest danger of life, or enormous bodily harm, then in his defence he may justify killing the assailant.

Where persons stand in the relation of husband and wife, parent and child, and master and servant, they may justify the killing of an assailant, when necessary to the defence of each other.

Excusable homicide is by the law of England deemed a crime, and is punishable by the forfeiture of goods, and the unfortunate person must now pray out a writ of pardon and restitution of goods : which however, is a matter of course. In this country it has not been deemed a crime, and the unfortunate person is subjected to no kind of punishment.

There is one species of murder, respecting which the statute has varied the mode of proof. If a woman be delivered of a bastard child, and she endeavour privately, either by drowning, or secret burying, or in any other way, by herself or others, so to conceal the death thereof, that it may not be known whether it was born alive, or not, she shall be accounted guilty of murder, unless she can prove by one witness at least, that the child was born dead. This law is intended to prevent the secret murdering of bastard children by their mothers, to conceal their disgrace : and for that purpose has introduced a presumptive mode of proof, which the nature of the case seems to require. This law however, has by many been considered as bearing hard upon female frailty, and a rigid construction of it, might expose an innocent woman to suffer death, who only attempted to conceal her disgrace, by concealing the death of a bastard child, which was born dead, and to which she is impelled by the strong inducement of preserving her character.

In England they require some presumptive proof, that the child was born alive, before from the circumstance of the concealment, they will convict the parent of murdering it. In this state it has not been considered necessary that the woman should produce a witness present at the birth of the child, to prove that it was born

dead :

\* 4 Black. Com. 186.

• 2 Hawk. P. C. 381.

• Statutes 162.

• 4 Black. Com. 198.

dead : but if by any circumstances, as the appearance of the child when found, the mind of the triers can be satisfied, that the child was still born, the mother, tho from a wish to hide her disgrace, she concealed the birth of her child, shall not be convicted of murder.

Before I finish my observations on murder, it may be proper to say something respecting suicide, or self-murder, which by the English law is deemed a crime. The person murdering himself, is called *felo de se*, and the punishment is a forfeiture of his personal estate, and the burial of his body in a public highway, with a stake driven thro it. The Roman law considered suicide as not within its animadversion ; and it is evident that the English law originated in the barbarous period of superstition, and cruelty. There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from the commission of such crimes, from a regard to their families. But it is evident that when a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence. Indeed this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment. This principle has been adopted in this state, and no instances have happened of a forfeiture of estate, and none lately of an ignominious burial.

The English nation have been distinguished for the frequent commission of acts of suicide. Such acts are rare in this country ; but no instance has happened more remarkable in any country, than that of Beadle, who coolly and deliberately in the exercise of his reason, murdered his wife, four children, and himself, from a dread of their being exposed to want.

We

We shall close this chapter by a discussion of the crime of Man-  
slaughter.

*d* The statute law has declared the punishment for this crime, and describes it to be a killing without malice aforethought : but we must have recourse to the common law for a complete definition of it. *e* "Manlaughter is the unlawful killing of another, without malice exprefs or implied, either intentionally upon a sudden quarrel, or unintentionally in the commission of some unlawful act." If upon a sudden quarrel, two persons fight, and one kills the other, if one be greatly provoked, as by pulling his nose, or other great indignity, and he kills the aggressor, it will be manslaughter, because there was no previous malice, and the act was done hastily without deliberation. But if there be sufficient time for passion to subside, and reason to interpose, and then the person provoked kills the other, it will be murder, because it was a deliberate act of revenge. *f* If a man detects another in the act of adultery with his wife, and kills him on the spot, by the English law it is manslaughter : for no man ought to be the judge and avenger of his own wrongs ; but such is the nature of this injury, that if any thing will justify the taking away life, as an instantaneous punishment by the party injured, it must be this. *g* And in England on the conviction of a person of manslaughter under these circumstances, the judges directed the punishment to be lightly inflicted.

Intentional manslaughter differs from homicide in self-defence, in this respect ; one is a sudden act of revenge, and the other a necessary act of self-preservation. Unintentional manslaughter differs from homicide, by misadventure in this respect ; the first results from an unlawful, and the last from a lawful act. *h* If two men fight, and one kills the other, it is manslaughter, because the act of fighting was unlawful. If a man does an act lawful in itself, in an unlawful manner, without due caution, it is manslaughter. Where a workman flings down a stone or piece of timber, into a street, and kills a man, it may be either homicide by misadventure, manslaughter, or murder. If in a country village where few pass, and due warning is given, it is misadventure. If in a large town, where people are constantly passing, it will be manslaughter, tho-

R r

warning

*d* Statutes, 135. *e* 4 Black. Com. 191, *f* Ibid. *g* Sir. T. Raym. 242.  
*h* 4 Black. Com. 191. *i* 3 Inst. 57.

warning be given : but if no warning be given, it will be murder, for such conduct evidences a general malice against all mankind. If one riding a horse, another whips him, by which he runs over a child and kills him, it is accidental in the rider, but manslaughter in the person striking the horse, for the act was a trespass.—Wherever death ensues in consequence of any dangerous and unlawful sport, as shooting, or casting stones in a town, the slayer is guilty of manslaughter, on account of the illegality of the acts.

\* The general rule is, that when an unintentional homicide happens in consequence of an unlawful act, it will be murder or manslaughter, according to the nature of the act which occasioned it. If it be in the commission, or in the attempt of committing a capital crime, it will be murder : as if a man should kill a woman in attempting to commit a rape, it would be murder : if the crime be not capital, or the act a trespass, it will be manslaughter.—There can be no doubt of the justice and propriety of making the unintentional killing of a person, murder, where the real intent was to commit a crime of as high a nature. But the law is too severe, to say that it shall be manslaughter in all cases, where the killing results from an attempt to commit a crime not capital, or to commit a trespass, and then to punish the crime under all the various circumstances with the same severity. It seems repugnant to reason and justice, to punish the offender under circumstances of the slightest criminality, with the same severity as offenders whose crime is attended with the deepest guilt. If a man hunting on another's ground, which is clearly a trespass, should happen in shooting game, to kill a person, this would be manslaughter according to the common law. Under these circumstances, it is hard and unjust to punish the unfortunate offender, with the same severity as the law punishes a man, who when stealing a horse unintentionally kills another. There certainly is a great difference in the criminality of these acts, and the punishment ought to be varied and proportioned accordingly. Perhaps this distinction might be adopted with propriety, that where a man unintentionally kills another, in committing or attempting to commit some crime of equal malignity with and deserving as severe a punishment as manslaughter, that he should be deemed guilty of that crime, and there would be no difficulty

In specifying these crimes. But that where the unlawful act intended to be done, could not be considered as deserving such severe punishment, it should either not be accounted manslaughter, or be called manslaughter in an inferior degree, and punishable with less severity. It is evident that where a man in committing a trespass, undesignedly kills another, he does not deserve to be punished with that severity, which is denounced against the crime of manslaughter : for he may thus by an accidental and involuntary act, be involved in the punishment for a crime, which he reprobates with all his heart, and would not commit on any consideration with design. The intent of the mind, constitutes the nature and degree of the crime. In a civil view, a man is responsible for all the consequences of the act, which he does to the party injured, whether he contemplated them, or not ; but in a moral view, the crime is not merely to be considered according to the consequences, which happen to ensue, but according to what the criminal had it in his power actually to contemplate or expect at the time of doing the act, and according to the intent of his mind. If it should be thought proper, that a man who kills another in attempting to commit some of the lowest crimes, or a trespass, should be punished for the purpose of making mankind more cautious and circumspect in their conduct, then let homicide under these circumstances constitute a new species of crimes, or an inferior grade of manslaughter, and let the punishment be proportioned to the nature of the offence. Then we shall follow the excellent rule of separating crimes in our definitions, that are really different and of not inflicting the same punishment, upon crimes of a different nature.

The statute punishes this crime by a forfeiture of all the goods and chattels of the offender, at the time of committing it, by whipping, burning in the hand with the letter M, and by a perpetual disability to be a juror or witness. The dreadful punishment annexed to this crime, must have been dictated by that horror which is universally entertained respecting homicide, without due attention to the circumstances under which it may be committed. But at this enlightened period, when reason and science have dispelled

the legislature will soon enact more rational and consistent laws on this subject.

This is the only crime punishable by a forfeiture of all the goods of the offender. In general, where a person is to be deprived of his property for a crime, it is in the nature of a fine, which is assessed by the court. This was borrowed from the English jurisprudence, where almost every crime works a forfeiture of the estate of the criminal. Laws most evidently adopted in those barbarous ages, when the rapacity of the rulers delighted to take advantage of the failings of their subjects, for the purpose of plundering them of their property.

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#### CHAPTER FOURTH.

#### OF RAPE, AND OTHER HIGH CRIMES.

**R**APE is where a man obtains carnal knowledge of a woman, with force and against her consent. To constitute this crime, there must be an actual penetration, and any attempt, however abusive and violent, will not be a rape, if this be not effected. Such attempt at common law, would be considered as a high-handed assault; but in this state, it is punishable by statute. Carnal knowledge of a female, under ten years, whether against her consent or not, is considered to be a rape at common law. This crime may be committed upon a woman let her character be ever so abandoned in point of chastity; for the law more charitably than rationally supposes, that there was a possibility of repentance and reformation. A male under the age of fourteen years, is considered to be incapable to commit this crime.

At common law, the party ravished is a competent witness to convict a man of a rape; but her credibility must be judged of, according to the circumstances of her testimony, and the facts which may be testified by other witnesses. If the witness be a woman of fair character, immediately make known the offence, and

searched

1 Statutes, 127. 4 Black. Com. 210. = Ibid. 213.

searched for the offender : if the party accused fled, and such circumstances happened as usually do, and probably will attend such transactions, then her testimony may be credited. But if her character be bad in point of truth as well as chastity, if she did not forthwith make complaint, but concealed the injury, if the place where she charges the fact to have been done, was where she might have been heard, and she made no outcry, if she be unsupported by others, and her story be not confirmed by those attendant circumstances, which are the most infallible clue to truth, she ought not to be credited. As the law gives a woman so much power, to subject a man to a capital punishment, it ought particularly to be observed, whether the witness has not had a previous controversy with the person accused, so that it is probable that the charge is made from motives of malice and revenge : especially if the witness be a woman of bad fame : for the vindictive spirit of lewd women, has furnished frequent instances of such conduct. If the female on whom the rape is charged to be committed, be under twelve years, if she has sufficient understanding to be a witness, she is admissible. When it is considered that this accusation is easy to be made, and that it is hard for an innocent man to defend against it, jurors should be cautious that their detestation of the offence should not influence them to convict a person upon slight evidence.

All nations have entertained such a detestation of this crime, that they have punished it with great severity, generally with death. When it is considered that it is so dangerous to society, so destructive to the peace of families, so distressing to the unhappy victim of it, and indicative of such a depravity of mind, the humane and benevolent heart, the strongest advocate for lenity of punishment, cannot find much fault with a law that subjects the criminal to the pains of death. Such is the punishment by our law, but as it is probable, that perpetual confinement to hard labour, would more effectually prevent the commission of the crime, it would be better to adopt that punishment.

In this state, not many years since, a man convicted of a rape, and sentenced to suffer death, petitioned the legislature for a commutation



mutation of his punishment, even to castration. The legislature granted his request, and the criminal underwent an operation, which effectually guards against a repetition of the offence, and would be a very proper punishment in all cases, were it not for the ridicule attending it.

I shall here treat of the crime against nature, or the crime not to be named, as some writers modestly express themselves. In considering a crime, which reflects such disgrace upon human nature, every person will be filled with horror and disgust. But to complete our view of criminal law, it is necessary to attend to the subject, however disagreeable, and we shall treat of it with the utmost decency.

Sodomy, or buggery is the unnatural connection between the human being and a brute. The statute inflicts the punishment of death on the offender, and to inspire the deepest detestation of the deed, directs that the very beast shall be slain and buried. I should have hardly thought it possible, that a human being could be so vile and depraved, as to commit this crime, had I not been present at the trial of a man indicted for it, and against whom the most explicit and convincing proof was adduced : but who escaped conviction from the circumstance, that no two witnesses saw him at the same time, tho sundry saw him at different times separately. The jury supposed that there must be two witnesses at the same time, to the same act, to comport with the statute, requiring the testimony of two or three witnesses, or that which is equivalent, to take away the life of man : but it is evident that this atrocious offender escaped that punishment which he richly merited, from a misapprehension of the jury respecting the law ; for it is clear that the testimony of five or six witnesses, to different facts of the same nature, tho they saw them separately, must be equivalent, to the testimony of two witnesses who saw the same fact together.

Of the same name, is the crime of carnal connection between human beings against nature. The statute enacts, that if any man lie with mankind, as with woman kind, both shall be put to death, unless one of the parties was forced, or under the age of fifteen years. This crime, tho repugnant to every sentiment of decency and

Our modest ancestors, it seems by the diction of the law, had no idea that a man would commit this crime with a woman, and therefore have not comprehended it in the statute. But in countries, where men have acquired a brutal relish for animal pleasure, this crime is frequently committed—and might here by force of common law be punished with death. The indictment must alledge that he had the venereal act, and carnally knew—

Notwithstanding the disgust, and horror, with which we treat of this abominable crime, we find that the elegant and modest Virgil, entertained very different ideas on the subject. He made the passion of a shepherd for a beautiful boy, the foundation of an eclogue, and Corydon sighs for Alexis, with all the fondness of a lover, and in all the harmony of pastoral numbers.

Tho the example of other Roman poets and the manners of the age, may in some measure excuse the choice of the subject, yet it is striking evidence, of the depravity, corruption, and debauchery of the Romans at that period, that they could relish a poem, which celebrated an unnatural passion.

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#### CHAPTER FIFTH.

#### OF MAYHEM AND ARSON.

**M**AYHEM according to the principles of the common law, is the violently depriving a person of the use of such of his members as may render him the less able in fighting, either to defend himself or annoy his adversary. This law was probably adopted in the heroic ages when war was considered as the noblest employment: but when our ancestors formed their criminal code, the ardor of heroism seems to have abated, and it is enacted, if any person on purpose, and of malice aforethought, and by lying in wait, shall cut, or disable the tongue, or put out an eye, or cut off any of the privy members, or shall be aiding or assisting therein, shall suffer

• Virg. Eclogue, ii.      § Statutes, 67.

suffer death. Any wounding of an inferior degree, is considered as a battery, and may be punished as a breach of the peace, and the party injured, recompensed in damages, according to the nature and aggravation of the injury.

7 The crime of arson is constituted and defined by statute. That if any person of the age of sixteen years or more, shall wilfully, and of purpose burn any dwelling house, barn, or out house, he shall be put to death, if any prejudice or hazard happen to the life of any person thereby. If part of a building be burned, and then extinguished, it is arson.

8 If any person shall wilfully and maliciously burn or destroy, or attempt to burn and destroy any public magazine or stores, or if any master or seaman, in a vessel belonging to the United States or this state, shall burn and destroy it, or in time of war, betray, or deliver it to the enemy, he shall suffer death: but in time of peace, the superior court have discretionary power to punish by whipping, not exceeding forty stripes, banishment, imprisonment not exceeding ten years, and forfeiture of estate. The establishment of the government of the United States and the laws enacted by Congress, will render this last law unnecessary.

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#### CHAPTER SIXTH.

#### OF CRIMES PUNISHABLE BY IMPRISONMENT IN NEW-GATE.

**T**HESE are, I. Robbery. II. Burglary. III. Forgery. IV. Counterfeiting. V. Horse-stealing. VI. Arson. VII. Attempting to commit a rape. VIII. Perjury. IX. Aiding to escape from New-Gate prison.

I. *f* Robbery is the forcible taking of goods or money, to any value from the person of another, by putting him in fear. The punishment for this crime has been pointed out by statute; but we must have recourse to the common law for its definition. The requisites to constitute this crime are, 1. There must be an actual taking. A mere attempt to rob, is punishable only as a high-handed breach of the peace. If the offender once take the thing,

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7 Statutes 66. 8 Ibid. 9 Ibid. 4 Black. Com. 242. 1 Hawk. P. C. 95.

tho he return it again, it is robbery. It is not strictly necessary that the thing be taken from the person ; if it be done in his presence, it is sufficient. Thus when a robber by threats and violence puts a man in fear, and drives away his sheep or cattle before his face. So where several in a gang commit a robbery, and one only takes the money, all are guilty in judgment of law. So if they fail of an intended prize, and one ride from the rest, and commit a robbery out of their view, and without their knowledge, all are guilty on account of the general intent. 2. Property of the least value, when thus taken, is sufficient to constitute the crime of robbery. 3. The taking must be by force, or by a previous putting in fear, which constitutes the aggravated nature of the offence. If the property be taken forcibly and against consent, without exciting fear ; as knocking a man down and taking his money while he is senseless, this is robbery tho there is no fear. The putting in fear need not arise from any great circumstances of terror : it is sufficient that so much force and threatening were made use of as to create an apprehension of danger, and compel a person to part with his property. If a person with a drawn sword begs alms, and a person apprehensive of danger gives, this is robbery.

II. Burglary is defined to be the breaking and entering into a dwelling house, or shop in the night time, with an intent to steal, or commit some high crime. To illustrate this subject, we must consider the time, the place, the manner and the intent.

1. \* The time must be in the night, when there is not sufficient day light to discern a man's face. If there be moon light, so that a person can be known, it will make no difference ; for the malignity of the offence arises from the circumstance of committing it in the night, when sleep has disarmed the owner of the powers of vigilance and defence.

2. \* The place according to the common law, must be a mansion house ; if it be a private house, a distant barn, or the like, it is not under the same privilege ; for the breaking open where no man resides, is not accompanied with the same circumstances of midnight terror. A house in which a man sometimes resides, and has

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\* Statutes, 17. 3 Inst. 63. 4 Black. Com. 224. 1 H.L. P. C. 50. 1 Hawk. P. C. 101. 2 4 Black. Com, 224, 225. 1 Hal. P. C. 566. Foll. 77.

only left it for a season, with an intent to return again, is a place where burglary may be committed, tho no person was in it, at the time the fact was done. If a barn, stable, ware-house or any out house be adjoining to, and parcel of the mansion house, tho not under the same roof, a burglary may be committed in them, for the capital house protects all the appurtenances, if within the home-stall.— A chamber in a college, or a room hired in a private house, are the mansion houses of the possessors, if they actually lodge there. Burglary cannot be committed in a booth, or tent, erected in a fair or market, tho the owner lodge there, because the law respects only permanent edifices. Burglary may also be committed in a church. The statute not only regards dwelling houses, but has gone beyond the common law, and makes it burglary to break into a shop, where goods, wares, and merchandize are deposited.

3. y The Manner must be both by entering and breaking, tho this need not be done at the same time : for a person may cut a hole one night and enter the next. There must be an actual breaking, a substantial and forcible irruption. If a man enters a house by a door, which he finds open, or thro a hole which was made there before, and steals goods, or draws anything out at a door or window, which was open before, or enters a house by the door in the day time, and lies there till night, and then steals and goes away without breaking any part of the house, he is not guilty of burglary. But he would have been guilty, if he had opened a window, picked a lock, or opened it with a key, lifted a latch, or any way unloosed the fastening, which the owner had provided and then entered, or having entered by a door or window, which he found open, or having lain in the house by the owner's consent, and then unlatches a door, or opens a door or window to go out of the house, or comes down the chimney, he is guilty of burglary. To knock at a door and on its being opened to rush in, or under pretence of taking lodgings, to fall upon the landlord, and rob him, or to procure a constable to gain admittance to search for any thing, and then to bind the constable and rob the house, have been considered burglaries, tho there was no actual breaking. If a servant opens and enters his master's chamber with a criminal design,

or

or if any person lodging in a public house, opens and enters another's door with a criminal design, or if a servant conspire with a robber, and let him into a house by night, this is burglary in all.

The least entry with the whole or any part of the body, or with an instrument held in the hand is sufficient. Thus to step over the threshold—to put a hand or hook into a window to draw out goods, or a pistol to demand one's money, or to turn the key of a door, which is locked on the inside, or to discharge a loaded gun into a house, are burglarious entries. Where several persons combine together to commit a burglary and some stand in adjacent places to watch, and the other break and enter, all are guilty, for the act of one in judgment of law is the act of all. The breaking may as well be after the entry as before, for if a person gets into a house or shop without breaking, and then breaks to get out, he is guilty of burglary.

4. The intent must be criminal. The common law definition is with an intent to commit a felony. Of course, if the intent be to commit murder, robbery, rape, mayhem, and the like, it will constitute burglary, as well as an intent to steal: tho in common speech we annex to burglary, the idea of an intent to steal only, and I never heard of any prosecutions for breaking a house with any other intent. If the intent be to commit a trespass, as beating the party, or disturbing the peace of his family, it is not burglary, but a trespass, or breach of the peace. Where a person breaks into a house with an intent to commit a crime, tho he does not perpetrate the crime intended, yet it is burglary.

III. Forgery, by the statute, consists in the following acts: to forge, counterfeit, or alter any of the bills of credit, or securities of this state, or any other of the United States of America, or any note, or obligation, or other writing of any person or persons whatsoever, to prevent equity and justice; or to utter and put off any such forged, altered, or counterfeit bill or bills, security or securities, note or obligation, or other writing, knowing them to be such, or to counsel, advise, procure, or in any way assist in the forging, altering, counterfeiting, or signing any bill, security, note, obligation, or other writing, knowing them to be false: or

to engrave any plate, or to make any instrument to be used for any of the purposes aforesaid.

IV. Counterfeiting is thus defined by statute : to stamp, or otherwise counterfeit any of the coins of gold and silver currently passing in this state, or to utter and put off any such counterfeit coins, knowing them to be base, and counterfeit, or to make any instrument or instruments, for the counterfeiting of any of the coins aforesaid, or to be aiding or assisting therein. The words forgery and counterfeiting, are clearly of the same signification. In a legal sense, one is applicable to writings, and the other to money. The statute has defined these crimes with such precision and accuracy, that any explanation is wholly unnecessary. I shall however mention a few cases that have been decided. A person was indicted for aiding and assisting in counterfeiting money. On a motion in arrest, it was contended that the aiding and assisting, related only to the making the instruments and did not extend to the counterfeiting ; but the court determined, that the aiding and assisting extended to the counterfeiting, as well as making the instruments. A person offered to a tavern-keeper, a counterfeit guinea to pay his bill, and to receive his change. The tavern-keeper discovering the guinea to be counterfeit, refused to change it, but retained it, and procured the person to be prosecuted. This was held to be an uttering and passing within the statute.

V. Horse-stealing is where one man feloniously takes and carries away another's horse or horses, with an intent to steal them. This crime is distinguished from theft in general, for the purpose of preventing it, by inflicting a severer punishment ; because the opportunities of committing it are greater, on account of the exposed situation of such property, and the facility with which the thieves make their escape, by means of the fleetness of the stolen horses.

The punishment of criminals convicted of the foregoing offences, is, that for the first offence, the offender shall suffer imprisonment in New-Gate prison, being a public goal or work-house, and there be kept to hard labour, for a term not exceeding three years,

at the discretion of the court before whom the conviction is had. If a person has been convicted of either of these crimes, previously to the time of erecting New-Gate prison, or afterwards, if any person shall be convicted a second time, of any of said crimes, he shall suffer imprisonment in said prison, and there be kept to hard labour, for a term not exceeding six years, and on conviction a third time; the offender shall suffer imprisonment during life.

If any person committing burglary, or robbery, shall in the perpetration of the crimes, be guilty of personal abuse or violence, or shall be so armed with any dangerous armour or weapon, as shall clearly indicate violent intentions, he shall on conviction for the first offence, be imprisoned and kept to hard labour during life. For these crimes, no punishment can be inflicted but that provided by statute, which supercedes the common law.

VI. If any male person of the age of sixteen years, or more shall wilfully, and feloniously burn, or attempt to burn by setting on fire, any dwelling house, barn, outhouse, shop, store, ship, or other vessel, and no prejudice, or hazard happen to the life of any person thereby, he may at the discretion of the superior court, on conviction thereof, be imprisoned in New-Gate prison, and there be kept to hard labor, not exceeding seven years, and on a second conviction for this offence, the offender may be there imprisoned, and kept to hard labor, for any limited period, or during life, as the circumstances of the case may require.

VII. If any person shall with force, and arms, and actual violence, an assault make on the body of any female, with an intent to commit a rape, he shall on conviction be imprisoned, and kept to labor in New-Gate prison, during life, or such other period, as the superior court shall determine : By the common law, this offence can only be punished as a high handed breach of the peace : but as it actually evidences all the baseness, and wickedness of heart, that the committing of a rape does, and as the abuse to the woman, and injury to her feelings must be nearly the same, it seemed necessary in proportioning punishment to crimes, that this act should be placed in a different grade, from breaches of the peace.

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The legislature has therefore with great propriety defined the crime, and inflicted upon it a punishment, that may be proportioned to its enormity.

VIII. Perjury by the common law is defined to be, where a lawful oath is administered in some judicial proceeding, to a person, who swears wilfully, absolutely, and falsely in a matter material to the issue, or point in question : the oath must be administered in a court of justice, or by some person having power to do it, and upon a lawful occasion.

*a* Swearing falsely in a deposition is included in this description, but if the oath was unlawfully administered, there can be no perjury committed. It must be wilfully, and knowingly done, with deliberation, and not on surprise. It must be absolute, and positive : therefore if a person swears as he thinks, remembers or believes, it will not be perjury. It is generally said that it must be false ; but if a man should happen to swear to the truth when he did not know it, but intended to swear to a falsehood, it will be perjury : it must be to some point material to the question in dispute, or material to induce the triers to believe the story of the witness. It is immaterial whether the testimony be credited, or any person injured by it.

Subornation of perjury, is the procuring another to take such false oath, as constitutes perjury in the principal. The punishment for these offences at common law, is fine, imprisonment, and perpetual disability to be a witness.

*b* The punishment for these offences by statute, is a forfeiture of twenty pound, one half to the public treasury, and the other half to the party injured, who shall sue for and prosecute the same to effect, and six months imprisonment in New-Gate, and perpetual disability to testify. If the offender is unable to pay the forfeiture of twenty pounds, he shall be set in the pillory for one hour, in the county town where the offence was committed or next adjoining to the place, and have both his ears nailed. The party injured may proceed by a *qui tam* prosecution against the offender, on this statute ; *c* and likewise a prosecution in the name of the state

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*a* 1 Hawk. P. C. 171. *b* Statutes, 190. *c* Ibid. 442.

by an informing officer may be pursued, in which case, the whole of the forfeiture goes to the treasury of the state. *d* By statute a quaker who is guilty of false affirmation or declaration, when administered to him, in lieu of the common oath, shall suffer the pains and penalties of perjury.

IX. *e* If any person shall effect the escape of any prisoner confined in New-Gate prison, or attempt the same, or shall give any help, or assistance therein, he shall upon conviction before the County, or Superior Court, be sentenced to imprisonment in said prison, for a term not exceeding six years, and pay the cost of prosecution.

*f* As it would have been improper to have confined females in New-Gate, where they must have been in the same apartment with males; it is provided that when a female is convicted of a crime, for which the punishment is imprisonment in New-Gate, she shall be confined with none but females in the common work-house, in the county where tried, and kept to such hard labor as may be suitable under the direction of the overseer, or may be imprisoned in the common goal in the county, and be kept to labor, according to the direction of the court, before whom she is convicted, for the same period as male offenders are liable to be confined in New-Gate for the same crimes.

*g* When the time of imprisonment has expired, and it appears by the warrant of commitment, that the prisoner was to stand committed till the cost should be paid, the overseers of the prison may assign such person in service to any citizen of the United-States, if he cannot pay, or secure the cost to their acceptance, for such time as they shall judge necessary to pay the cost, taking reasonable security for payment of the person to whom they shall make the assignment. If no suitable person appear to take in service such prisoner, they may direct the master of the prison, to hold him in service in the prison, such time as they shall limit to pay the cost, allowing him customary wages for like service. If such prisoner be unable to labour, the overseers may take the best security they can for the cost, and order the master to discharge him

*d* Statutes, 197. *e* Ibid. 394. *f* Ibid 474. *g* Ibid. 417.

him. If a prisoner escapes, and is re-taken, and re-committed he shall pay all the expence, in the manner provided for the payment of cost, and the time between the escape, and re-commitment, shall not be considered as part of the time for which he was sentenced to imprisonment.

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## CHAPTER SEVENTH

### OF CRIMES AGAINST RELIGION.

**C**RIMES of this description are not punishable by the civil arm, merely because they are against religion. Bold, and presumptuous must he be, who would attempt to wrest the thunder of heaven from the hand of God, and direct the bolts of vengeance where to fall. The Supreme Deity is capable of maintaining the dignity of his moral government, and avenging the violations of his holy laws. His omniscient mind estimates every act by the standard of perfect truth, and his impartial justice inflicts punishments, that are accurately proportioned to the crimes. But short sighted mortals cannot search the heart, and punish according to the intent. They can only judge by overt acts, and punish them as they respect the peace, and happiness of civil society. This is the rule to estimate all crimes against civil law, and is the standard of all human punishments. It is on this ground only, that civil tribunals are authorised to punish offences against religion.

The crimes against religion are, I. Blasphemy, II. Atheism, III. Polytheism, IV. Unitarianism, V. Apostacy, VI. Breach of Sabbath, VII. Profane Swearing.

I. *b* Blasphemy by the Statute is where a person wilfully blasphemes the name of God, the Father, Son, or Holy Ghost, either by denying, cursing, or reproaching the true God, or his government of the world. The punishment is whipping not exceeding forty stripes, and setting in the pillory one hour; and the superior court which has cognizance of the offence, may at discretion bind the offender to his good behaviour.

Blasphemy

**I. Blasphemy at common law**, is the denial of the Being and Providence of God, contumelious reproaches against Jesus Christ, profane scoffing at the holy scriptures, and exposing them to contempt and ridicule. The crime is punishable by fine and imprisonment, and other infamous corporal punishment.

**II. Atheism** is defined by statute, to be where a person educated in, or having made profession of the christian religion, by writing, printing, teaching, or advised speaking, denies the being of a God.

**III. Polytheism**, is where a person educated in, and having professed the christian religion, asserts and maintains by writing, printing, teaching, or advised speaking, that there are more Gods than one.

**IV. Unitarianism**, or denial of the Trinity, is where a christian by education, and profession, denies either by writing, printing, teaching or advised speaking, that any of the persons in the Trinity are God.

**V. Apostacy** is where a person educated under the wings of christianity, and having professed to believe it true, either by writing, printing, teaching, or advised speaking, denies the christian religion to be true, or the holy scriptures of the old and new testament, to be of divine authority.

As a punishment for the four last crimes, the statute enacts, that on conviction for the first offence, the offender shall be incapable to have or enjoy any offices or employments, ecclesiastical, civil or military, or any part in them, or profit by them, and the offices, places and employments, enjoyed by such offenders at the time of their conviction, shall be void. On a second conviction, such person is disabled to sue, prosecute, plead or maintain any action or information in law or equity, or to be guardian, executor, or administrator. The prosecution must be within six months after the commission of these last offences, and the law has that tenderness and indulgence for the errors of human reason and the infirmities of human nature, that it opens the door for repentance and restoration, and provides that upon renouncing the erroneous opi-

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nions within twelve months after conviction in the court where convicted, the person shall from that time be discharged from all the disabilities incurred by the conviction.

These are all the crimes respecting religious opinions known to our law. Blasphemy is so indicative of an abandoned heart, and injurious to the morals, that no one can question the propriety of punishing it.

The being of a God is so universally impressed on the human mind, that it seems unnecessary to guard against a denial of it by human laws. Atheism is too cold and comfortless, to be a subject of popular belief.

Polytheism tho it has been believed by the most polished, as well as the most savage nations, has no chance of a revival where the unity of a god has been promulgated. The elegant fictions of the Grecian and Roman mythology, vanished like the baseless fabric of a vision, before the light of rational philosophy, and true religion. We must acknowledge that the multitude and subordination of the pagan gods furnish a system of poetical machinery, much more beautiful and magnificent than the christian theology. They seem to be a kind of poetical divinities, created by the bards of ancient times, to ornament and embellish poetical description, and one can hardly think they were ever the object of popular belief and serious adoration. The rapes of Jupiter and the amours of Venus, seem to render them very improper deities, for religious devotion. The character of God in the christian system, is too sublime and glorious to be exhibited in verse, and his conduct in the government of human affairs does not admit him to be introduced into the machinery of a poem, in such manner as will give scope to the fictions of fancy, and the embellishments of the imagination. The bold and vigorous genius of Milton, flags in such an attempt. In his description of the battle of the angels in heaven, the wild fiction of their inventing cannon, and throwing mountains at each other, while the Supreme Deity from his immortal throne beholds the wild affray, is so inconsistent with the nature and character of spiritual essences, that we are highly disgusted with the scene, tho painted in the most glowing colours, and can only consider it as a sublime burlesque upon the king of heaven. No event which the human race have

have witnessed, is more solemn and awful, than the passion of our Saviour. Vida, an eminent Italian poet, has painted it in the most brilliant colouring, and decorated it with the richest poetical fictions, yet the scene is far less interesting and magnificent, in this poem, than in the plain and unadorned narrations of the evangelical historians. But when Homer exhibits the Grecian mythology in action, when the gods assemble in council, when Jupiter thunders from Olympus, and Apollo, Neptune, Mars, and Venus, mingle in the combat round the walls of Troy : we are charmed with the elegance of the fictions, the richness of the descriptions, the splendor of the scenery, the variety of the action, and the consistency of the conduct of these imaginary beings, with the character ascribed to them. But tho polytheism, furnishes the best machinery for poetry, there is no danger that it will root out the belief of the unity of God, and revive and flourish on the ruins of christianity.

To prohibit the open, public, and explicit denial of the popular religion of a country, is a necessary measure to preserve the tranquility of a government. Of this no person in a christian country can complain, for admitting him to be an infidel, he must acknowledge, that no benefit can be derived from the subversion of a religion which enforces the best system of morality, and inculcates the divine doctrine of doing justly, loving mercy, and walking humbly with God. In this view of the subject, we cannot sufficiently reprobate the baseness of Thomas Paine, in his attack on christianity, by publishing his *Age of Reason*. While experiencing in a prison, the fruits of his visionary theories of government, he undertakes to disturb the world by his religious opinions. He has the impudence and effrontery, to address to the citizens of the United States of America, a paltry performance, which is intended to shake their faith in the religion of their fathers ; a religion, which, while it inculcates the practice of moral virtue, contributes to smooth the thorny road of this life, by opening the prospect of a future and better : and all this he does not to make them happier, or to introduce a better religion, but to imbitter their days by the cheerless and dreary visions of unbelief. No language can describe the wickedness of the man, who will attempt to subvert a religion,  
which

the same is a source of comfort to the soul, and leads to its union with God, and to the pursuit of every thing that is good and beautiful in religion.

The same is the case of christianity's numerous persecutions and sufferings, and more tortures of persecution, excepting the doctrine of the Trinity, are left open for free and useful discussion. The crime of heresy is unknown. Error and explicit denial can only be commended by the future. Confessions can never be drawn, and implied by implication from the conversation, or writings of a person, into a breach of the law. It extends only to those who have been educated in or made profession of christianity. For a ancient heathen people, the Jews, who have been so long abused and infected by christians, the Mahometans, who pray five times a day, the Bramins who believe in transmigration, and the Tatars who prostrate himself before the Grand Lama, may all teach the doctrines and practice the ceremonies of their religions, without being exposed to any penalty.

It is with the highest pleasure, that we compare our laws with other nations in this respect. Tho' our ancestors on flying from the hand of persecution, into this asylum of liberty, were anxious to preserve a uniformity of religious opinion, and public worship, yet they never attempted to effect their design by severe laws and sanguinary punishment. Prosecution never fasted her eyes upon wretched victims, tied to the stake or stretched on the rack. The severest laws against heretics, extended no further, than to send away such as came into the country, and to inflict a penalty on those who harboured or brought them into the government. At an early period our laws began to exempt sect after sect, from any penalty, and then by degrees, extended to all the full blessings of toleration

† In the title page the work is said to be written by Thomas Paine, secretary for foreign affairs to Congress in the American war. The truth is, that during some period of the American war, Congress appointed a committee for foreign affairs, to which Paine was secretary, but had no power, and performed no duty, but that of a clerk to the committee; without any portion of the authority, afterwards annexed to the office of secretary for foreign affairs. From the post of secretary to the committee for foreign affairs, he was dismissed for a scandalous breach of trust. What must we think of a man, who is capable of such a pitiful artifice to gratify his vanity, and render himself important.

toleration. While the civil arm was cautious in punishing the religious opinions of the people, no power of a secular nature was delegated to the church for that purpose. They could only inflict the sentence of excommunication, which secluded a person for misconduct, from the communion of a religious congregation, but subjected him to no civil inconvenience whatever.

VI. / Breach of Sabbath consists in a variety of acts, which are punishable by statute. Non attendance on divine worship in some lawful congregation, subjects a person to a fine of three shillings: but this law has grown obsolete.

No person may keep open his shop, store, ware-house, or work-house, or do any manner of secular business, (works of necessity and mercy excepted,) nor be present at any concert of music, dancing, or any public diversion, or show, or entertainment, nor use any game, sport, play, or recreation, on any part of the Lord's day, upon a penalty not exceeding twenty, nor less than ten shillings. No traveller, drover, waggoner, or teamster, or their servants, may travel on that day, (except for necessity or charity,) under the same penalty. Companies may not meet in the streets, or elsewhere, nor any persons go from home, unless to attend public worship or some work of necessity and mercy, upon the penalty of five shillings.

No tavern-keeper may entertain, or suffer any of the inhabitants of the town, or others, not strangers or lodgers, to be in their houses or dependencies, drinking or idly spending their time, on Saturday night after sun-set, on Sunday, or the evening following, on penalty of five shillings, and every person so spending his time to forfeit the same sum. Informations must be made within a month. No warning or notification of any secular business may be fixed on a door of any meeting-house to remain there on any day of public worship, upon penalty of five shillings, to be paid by the person putting it up, and grandjurors, constables and tything-men are directed to pull them down. No vessel may unnecessarily depart from any harbour, port, creek or river, nor pass by any town, where public worship is maintained, nor weigh anchor



anchor within two miles, unless to get nearer thereto, on the Lord's day, at any time between the morning light, and the setting sun, upon penalty of thirty shillings to be paid by the master. Any person behaving rudely or indecently within the house, where any congregation are met for public worship, may be fined not more than forty, nor less than five shillings. The service of a civil process on the Lord's day is void, and the officer incurs a penalty of ten shillings.

All fines imposed for a breach of this act, on minors, shall be paid by their parents, guardians, or masters, if any be, otherwise such minors are to be disposed of in service to answer the same, and upon refusal and neglect to pay such fine and cost, the offender may be committed, unless he be a minor, in which case execution for the fine and cost, shall issue against his parent, guardian, or master, at the end of a month, after conviction. No appeal is allowed upon a conviction of any offence in this statute.

The statute law to prevent the disturbances of public worship, has provided, that if any person or persons, either on the Lord's day, or any other day, shall wilfully interrupt, or disturb any assembly of people, met for the public worship of God, within the place of their assembling, or out of it, each person so offending, shall pay a fine not exceeding ten pounds, nor less than twenty shillings: and that in case the offender is a minor, the fine is to be collected as aforesaid, and if not, then on neglect or refusal, he may be committed.

There seems to be an inaccuracy in this statute. After the above direction respecting the payment of fines, there is a clause, that where there is a conviction for any profanation of the Lord's day, or any disturbance of public worship, if the offender neglect or refuse to pay the fine, or present estate, that he may be whipped, not exceeding twenty stripes, by order of the court before whom he was convicted. The first paragraph, directs on neglect to pay, that the offender be committed, in case of all fines imposed for a breach of this law, and the last directs, that in such cases he

he be whipped. These paragraphs being contradictory, the courts must determine which is void.

It is directed by statute, that where children or servants are under the age of fourteen, on conviction of profanation, or disturbance, they shall be corrected by their guardians, parents, or masters, in presence of some officer, if the authority so appoint, and in no other way, and if they neglect, or refuse to correct, they shall incur a penalty of three shillings.

VII. *m* The swearing rashly, vainly, or profanely, by the holy name of God, or any other oath, or the sinful and wicked cursing any person, subjects the offender for every offence, to a fine of six shillings, and if he be unable or refuse to pay, he shall be set in the stocks, not exceeding three hours, nor less than one, for one offence, and pay cost of prosecution.

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#### CHAPTER EIGHTH.

#### OF CRIMES AGAINST CHASTITY AND PUBLIC DECENCY.

**T**HESE crimes are, I. Adultery. II. Incest. III. Polygamy. IV. Fornication. V. Lascivious Carriage and Behaviour. VI. A Man being found in a bed with another's Wife. And, VII. Public Indecency.

I. Adultery is the carnal connexion of a man with another's wife. The man may be either married or single ; but the woman must be married : for the essence of the crime, is the adulteration of the offspring, the spuriousness of the issue. If a married man has carnal knowledge of a single woman, it is not adultery, but fornication. This distinction is founded in nature. The common opinion of mankind declares, that it is a very different and much more heinous crime for a woman that is married, to have criminal conversation with a single man, than for a married man, with a single woman. A married woman that submits to the embraces of any man but her husband, does by that act, alienate her affections, deprave her sentiments, and expose him to the greatest  
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of all misfortunes, an uncertainty with respect to his offspring, or to support the children of another. But it is possible, tho hardly probable, that a married man may be concerned in an intrigue with a girl, without impairing his conjugal affection, and at any rate he does not subject his wife, to maintain the children of another, nor does that act produce such total depravity of moral character in a man, as in a woman: for when a female once breaks over the bounds of decency and virtue, and becomes abandoned, she is capable of going all lengths in iniquity: but there are frequent instances of men, who disregard the principles of chastity, but in other respects conduct with propriety.

It must however be granted, that it is a crime of a much blacker nature for a married than a single man, to commit fornication. For he not only does an injury to his wife, but brings disgrace upon his family. It would therefore be proper, that a married man should be punished with greater severity for committing fornication, than a single man: but with less severity than in the case of adultery; for this would be proportioning the punishment to the crime, according to its influence on society, which is the only standard of human punishments.

" The punishment for adultery is discretionary whipping, branding in the forehead with the letter A, and wearing a halter about the neck, on the out side of the garments so as to be visible. On being found without the halter, on information and proof made before an assistant or justice of the peace, he may order them to be whipped not exceeding thirty stripes.

• If a man and woman, who have been divorced shall again cohabit together as man and wife, they shall be punished as adulterers.

p It has been determined, that the fact of a man and woman being found in bed together, naked, is such presumptive proof of the commission of the crime of adultery, as will justify a conviction, tho the same evidence would have convicted the man of the offence of being found in bed with another's wife, if he had been prosecuted for that offence.

## II. Incest

" Statutes' 8 • Ibid. 137. p Kirb. 87.

II. Incest is the marriage or carnal copulation between relations within certain degrees of consanguinity and affinity, prohibited by statute. This prohibition is extended to all degrees in the ascending and descending line, and to the third degree in the collateral line. Formerly the law prohibited a man to marry his wife's sister, but that law has lately been repealed. The punishment is, that the offenders shall be set on the gallows for the space of one hour, with a rope round their necks, and the other end over the gallows. On the way from thence to the common goal, they shall be severely whipped, not exceeding forty stripes; they shall forever wear the capital letter I, two inches long, and of proportionable bigness, cut out of cloth, of a contrary colour to their clothes, and sewed upon the upper garments, on the out side of the arm, or on the back in open view. If they are found without such letter worn as aforesaid, they may by warrant from an assistant or justice of the peace, be apprehended and ordered to be publicly whipped, not exceeding fifteen stripes, and so as often as they are guilty. The issue of such marriage or carnal copulation, is disabled from inheriting or taking any estate, being generally named in a deed or will, by the father or mother, and the marriage is declared to be void. If the parties shall afterwards converse together as man and wife, or dwell together in the same house, they shall be punished as adulterers. The superior court may assign to the woman so separated, such reasonable part of her late husband's estate, as in their discretion the circumstances of it will admit, not exceeding one third.

III. Polygamy is where a married person marries another, the former or other husband or wife being living: or where such persons continue to live together when thus married. The punishment is the same as in cases of adultery, and the marriage void. If either party at time of marriage, be ignorant that the other is married, and separate immediately on discovering it, that party will not be guilty of any crime: but a continuance to live together after knowing the fact, will be criminal. The offenders are to be tried in the county where apprehended.

This statute does not extend to those persons, whose husband or

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wife shall be continually beyond the seas, by the space of seven years together, or whose husband or wife shall absent him, or herself, the one from the other, for that time, the one of them not knowing the other to be living within that time. Nor shall it extend to persons whose husband or wife have gone to sea in any ship or vessel, bound from one port to another, where the passage is usually made in three months time, and such ship or vessel shall not be heard of in three years, or be heard of under such circumstances, as may rather confirm the opinion, that the whole company are lost. In such cases the matter being laid before the superior court, the parties may be esteemed and declared single and unmarried, and upon such declaration thereof, and liberty obtained from the superior court, such parties may marry again. This statute does not extend to persons legally divorced, or whose first marriage was within the age of consent, which is fourteen for a man and twelve for a woman.

IV. *r* Fornication is the carnal copulation of a man and single woman. The punishment is a fine of thirty-three shillings to the county treasury, or corporal punishment not exceeding ten stripes, but corporal punishment is never inflicted.

V. *r* Lascivious carriage and behaviour is a crime of very uncertain description. The statute enacts, that for the preventing of lascivious carriage and behaviour against, and for the punishment of which, (in regard of the variety of the circumstances, particular and express laws cannot be easily made and suited) the county courts shall be impowered, and directed to proceed against and punish such persons, as shall be guilty of lascivious carriage, and behaviour, either by imposing a fine on them, or by committing them to the house of correction, or by inflicting corporal punishment on them, according to the nature and aggravation of the offence, and the discretion of the court: that such seasonable and exemplary punishment may be inflicted upon offenders of that kind, that others may hear and fear.

The general terms, and the uncertain signification of the words of this statute are such, that it is no wonder that judges and lawyers have always been puzzled about the meaning of it. Indeed no con-

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sistent construction has ever been put upon it. Persons have been punished as violators of this act, for passing thro a town with their nudities exposed. This manifestly was public indecency, an offence at common law. Persons have been punished on this statute for attempting to commit rapes, and exposing their nudities. This was clearly a high-handed breach of the peace at common law. As the statute gives courts power to inflict very severe punishments on this crime, it is necessary to know the acts which come within the description of it. For the purpose of establishing a rational construction, we must consider the state of society, and manners, and the sentiments of the people at the time the law was past, the probable object they had in contemplation, the true import of the word lascivious, and whether the legislature did not intend to punish a crime, not punishable by any laws then in being.

This act was passed in the earliest period of the government. The first settlers of this country, most unquestionably brought with them much of the spirit of puritanism. The gloominess of their manner, was heightened by the singular opinions they entertained respecting social pleasure. They considered the joys of love, to be in a great measure inconsistent with the grace of God ; they reprobated the carnal appetites of men, and many entertained the whimsical idea, that the husband should not indulge in the conjugal act in the arms of his wife, with any other view than that of procreation. The singularity of these sentiments, were first displayed at New-Haven, in the punishment of young persons of both sexes, for the crime of filthy dalliance in some of their innocent frolics and amusements, which gave birth to the fiction of the blue laws, respecting which, so many laughable stories have been told, and which is unquestionably the proto-type of the act respecting lascivious carriage and behaviour. When people entertained such whimsical ideas, respecting the impurity of the sexual passion, it is not strange that they should attempt to restrain the intercourse of the sexes, by severe laws, and to establish the greatest purity of manners. They could not have it for their object to punish crimes already punishable by law. It was evident that the crimes of adultery and fornication did not comprehend every act in the intercourse of the sexes, which was repugnant to virtue and innocence : that between these,  
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and that connexion of the sexes which is consistent with chastity, decency, and delicacy, there are many acts which are improper and vicious. It was pursuant to the spirit of the times, to attempt to restrain them; but as they are so various that they could not be described in detail, they were all comprehended under the description of lascivious carriage and behaviour: and tho the legislature intended to introduce an austerity of manners and reserve, in social intercourse, which would have thrown a gloom over life and excluded the most innocent amusements, yet by a liberal construction of their law, it may now be directed to restrain that licentious familiarity between the sexes, which is repugnant to decency and virtue. Lascivious, has an appropriate meaning, and signifies the exercise of lustful passions, or unchaste and wanton desires, between the sexes; and when applied to carriage and behaviour, these words signify the acts which evidence the exercise of those feelings.

Having premised these general observations, I shall hazard a definition of this crime, which I think is a fair, rational and consistent construction of the statute. Lascivious carriage and behaviour, may be defined to be those wanton acts between persons of different sexes, which do not amount to carnal copulation, which are inconsistent with that decent intercourse of the sexes, that is warranted by virtue and innocence, and which are repugnant to the sentiments of delicacy and chastity. These acts are unaccompanied with force and violence; for if they are committed with force, they would be breaches of the peace, punishable at common law. Lascivious carriage cannot be the same as public indecency, for that does not necessarily import lasciviousness, but may be committed without exciting lascivious ideas, and is punishable as an offence at common law. It is a crime created by statute, is unknown to the common law, has relation only to the intercourse of the sexes, and is intended to restrain a wanton indulgence of the passion of sex. It would be hardly consistent with delicacy, to illustrate these observations by detailing those actions, which come within the description of this crime. The imagination of every person will suggest a thousand indecent familiarities, which are the objects of this

this statute, which ought to be restrained, and deserve to be punished.

The court have a discretionary power to punish by fine, committing to the house of correction, and whipping—This statute needs correction. It is improper and dangerous to give to courts such latitude of construction, with respect to the acts which are criminal, and then to vest them with such boundless discretion in inflicting the punishment. It breaks that gradation of crimes, which ought to be regarded, and admits a disproportion of punishments, to crimes, which is incompatible with the principles of justice. I have known a man on a prosecution by virtue of this law, fined thirty pounds, for a connection with a woman, less criminal than fornication, who if he had committed fornication, and had been convicted, would not have been fined but thirty three shillings.

VI. \* The offence of a man's being found in bed with another's wife, subjects them both to be whipped, not exceeding thirty stripes ; but if one party was surpris'd, and did not consent, that shall excuse the punishment. It seems unnecessary to have pass'd this law ; for the proof of the fact, that a man was in bed with another's wife, must be sufficient to convict them of adultery, or it ought not to convict them of any crime.

VII. \* Public Indecency is a crime at common law ; as where sundry persons from a balcony displayed their nudities, to a large concourse of people : and where a man went through a town with his nudities expos'd to view. So is any gross lewdness, a crime at common law, as the keeping or frequenting a bawdy-house. They are punishable by fine and imprisonment.

Such are the laws which have been framed to preserve the inestimable virtue of chastity ; but such is the strong and perpetual temptation to the commission of crimes, against chastity, and so deep is the veil of secrecy, which the modesty of the most profligate, throws round these transactions, that it is impossible to restrain them by the terror of penal laws. Purity of manners must depend upon principles instilled into the minds of youth by education, and all parents are under the strongest obligations, to impress on  
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the minds of their female children, these all-important truths ; that chastity is the peculiar ornament of the sex, that innocence gives the brightest lustre to their charms ; that their connection with the other sex, ought to be marked with the utmost delicacy in their conversation, and decency in their deportment : and that they should forever be on their guard against that indecorous familiarity, which leads by slow but sure steps, to irretrievable disgrace and ruin.

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CHAPTER NINTH.

OF THEFT, RECEIVING STOLEN GOODS, AND THEFT-BOTE.

**T**HEFT is the taking and carrying away the personal goods of another, with an intent to steal.

1. \* There must be a taking without the knowledge, and consent of the owner. If there be an actual delivery of the goods, and the possession is acquired lawfully, no subsequent act can render it stealing. y If a carrier should open a pack of goods, and take away part of it, or if he carry it to the place appointed, and then afterwards take it away, he is guilty of theft ; but the mere not delivering, would only make him guilty of a breach of trust. If goods are delivered to a man to keep, and he run away with them, it is not theft ; for the original possession was lawful. z If a man deposit property in the hands of a pawn-broker, or entrust it with any other person, and then take it away with an intent to charge the bailee, with the value of it, it is theft.

2. There must be a carrying away. A bare removal of the goods is sufficient. • If a man be leading a horse out of another's pasture, and be apprehended in the fact ; if a guest stealing goods out of an inn, has removed them from his chamber down stairs ; or if a thief intending to steal plate, take it out of a chest and lay it on the floor, and is surprised before he can go away with it, in these cases it is theft.

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w 4 Black. Com. 229. x 1 Hal. P. C. 504. y 3 Inst. 107. z Fost. 123.  
• 3 Inst. 108.

3. *§* The act must be accompanied with an intent to steal the goods. This intention is discoverable by a great variety of circumstances, as where the person takes the thing clandestinely, and secretes it, or conducts with it in such a manner, as to shew he intends to keep it from the owner, or being charged with the fact, denies it. But if the thing be taken and kept openly, as if a servant takes his master's horse without his knowledge and returns it, or if a neighbour takes another's plough left in the field and uses it, these cases are but trespasses.

4. *¶* It must be the personal goods of another. Every personal thing possessing value, and capable of ownership, may be the object of theft. The thing must be of a personal nature; for if the things are real, or favour of realty, theft cannot be committed of them. Thus things adhering, or annexed to the freehold, as corn, grass, trees, fruit, or lead upon a house, cannot be the subjects of this offence: but the taking them with whatever intention, is merely a trespass. But if the thing be severed from the freehold by a tortious act, at one time, and so rendered moveable, or personal estate, and then taken at another time, the last taking will be theft; or if any other person make the severance, the taking will then be criminal. This distinction of the common law is very whimsical. If a person should pluck an ear of corn from the stalk, and carry it away, it is only a trespass; but if he finds an ear on the ground, separated from the stalk, and takes and carries it away, it is theft. The true principle is, that every act of taking the property of another, where the disposition to steal can be exercised, should be called theft. It is apparent that this intent can as well accompany the act of taking things, which must be severed from the realty, as in taking personal things, and that there is as much necessity in guarding one species of property, as the other. This doctrine of the common law produces great inconvenience, as it respects the preservation of fruit. As fruit is to be severed from the realty, and of course the taking it being only a trespass, there are many persons who are capable of the mean act of stealing fruit, when they would abhor the idea of stealing any other property. Annex to the act of stealing fruit, the punishment due to stealing, and we should

should find that the disgrace of it, and the probability that *they* might be detected, and whipped as thieves, which they all deserve, would deter many from a practice, which is now very wickedly deemed by many as a matter of frolic and amusement. In England, statutes have been enacted to punish as theft, the taking of things annexed to the freehold, in a great variety of instances.

• Bonds, bills, notes, or any writings, which concern mere choses in action, at common law, cannot be the object of theft; because it is said they are of no intrinsic value, and import no property in the possession of the person from whom they are taken. But this doctrine appears to me not to be warranted by the general principles of the law, for the paper on which such contracts are written, is certainly capable of ownership, and of course may be the object of theft. In England, they are by statute put on the same footing as the money they were meant to secure.

• Animals, in which there is no property, either absolute, or qualified, cannot be the object of theft. Thus beasts of a wild nature, and unreclaimed, as fish in an open river, or pond, or wild fowls at their natural liberty, cannot in a legal view be stolen; but if they are reclaimed, and confined so that they can be taken at pleasure, and serve for food, the taking them may be theft. Theft may be committed of all domestic animals of a tame nature, which serve for food, as cattle, swine, sheep, and poultry; but those animals which do not serve for food, as dogs, and creatures which are kept for pleasure, or whim, tho the owner may maintain a civil action for the loss of them, yet the taking them away can never be theft. Tho theft cannot be committed of a thing, unless there be some property, and an owner, yet it is immaterial whether the owner be known, for a thief may be punished for stealing the goods of a person unknown.

Theft in the English law is called larceny, and is divided into petty larceny, the stealing of a thing of the value of twelve pence, or less, punishable by whipping: and grand larceny, the stealing of a thing of greater value than twelve pence, punishable with death. Larceny is also divided into simple and mixed: simple when

where the taking is not from the house or person : if the taking is by night, upon breaking, and entering the house, it is burglary : if from the person by violence, and putting in fear, it is robbery ; but if the things are taken from the house without breaking, or from the person, in a private manner, it is mixed larceny. But in this state these distinctions are of no consequence. Our ideas of burglary and robbery correspond with theirs : and as to theft, it makes no difference whether the goods are taken from the house, the person, or the field.

§ This crime is prohibited and punished by statute. The offender forfeits treble the value of the goods stolen, to the owner, and is to be fined at the discretion of the court, not exceeding forty shillings. If the value of the goods stolen, amount to twenty shillings, he shall suffer an additional punishment of whipping, not exceeding ten stripes, for one offence. If the value of the goods be more than five shillings, and less than twenty, and the offender refuse, or is unable to pay the fine imposed, he may be whipped at the discretion of the court, not exceeding ten stripes. If the offender is unable to make restitution, the court may assign him in service.

It is also provided by statute, that where a conviction is before a single minister, an additional punishment may be inflicted, by committing the offender to the work-house, or house of correction, to be kept to hard labour on the first conviction, not less than a month, nor more than three ; on the second, not less than a year, nor more than three. If the conviction be before the county court, then not less than six months for the first offence, and so for a longer time, as the court shall think proper, according to the circumstances of the offence, and the number of convictions : but for the first offence no person shall be committed to the work house, unless he be twenty-one years of age, and the court are of opinion that he is a rogue, vagabond, or common beggar, or a lewd, idle, profane, or disorderly person.

II. ; Receiving stolen goods, knowing them to be such, is at common law, an offence punishable by fine and imprisonment : but a trial of the accessory, must have been preceded by a conviction of the principal. It has therefore been provided by statute,

§ Statutes, 244.      X x      that  
 b Ibid. 208.      i 4 Black. Com. 132.      Statutes 245.

that those who conceal any theft, (unless committed by some member of his family,) or shall receive and conceal stolen goods, knowing them to be such may be proceeded against as principal, and punished in the same manner tho the principal be not convicted.

III. ; Theft-bote is where the party robbed, or from whom goods are stolen, takes them again, or other amends upon an agreement not to prosecute : and at common law is punishable by fine and imprisonment : but the bare taking one's goods, without shewing any favour to the thief, is no offence.

#### CHAPTER TENTH.

#### OF CRIMES AGAINST THE PUBLIC PEACE.

I. **O**F Challenges to Duels. To trace the history of the origin and progress of duelling, would be an amusing and interesting work, but foreign to our enquiries. It is sufficient to remark, that in defiance of the solemn monitions of religion, and the tender claims of humanity, it has for many ages, produced immeasurable distress in many a private family, and still continues to reflect the deepest disgrace upon the manners and character of modern times. It is however a subject of the greatest satisfaction to remark, that this practice is growing every day less fashionable and reputable, and that the voice of reason, seems to prevail over those visionary ideas of honor, and that mad heroism which have so often prompted friends, for the most trifling quarrels, to shed each other's blood, and to involve their families in ruin and distress.

Long experience having shewn, that duelling could not be prevented, by considering the successful combatant as a murderer, the measure of rendering the giving and accepting a challenge, highly punishable, has been adopted. This expedient is founded in good policy : for a person will be cautious about entrusting his enemy with a challenge, which would furnish evidence to subject him to a heavy punishment. & It is provided by statute—that if any person shall challenge another, or shall accept a challenge, to fight at sword,

sword, pistol, rapier, or other dangerous weapon, the person so challenging, or accepting, shall forfeit to the public treasury, one thousand pounds, and find sureties for his good behaviour during life, and be forever disabled from holding any office of profit or honor, and if unable to pay the forfeiture, to be closely imprisoned during life.

If any person shall willingly or knowingly carry or deliver any written challenge, or verbally deliver any message, purporting to be a challenge, or be present at fighting a duel as second, or aid and give countenance thereto, he shall on conviction suffer the aforesaid punishment saving the finding sureties for good behaviour during life,

II. / A Riot is where three or more persons shall come or assemble together, with an intent to do any unlawful act, by force and violence, against the person of another, as to kill, beat, or otherwise hurt him, or against his possession or goods, as to break open or pull down any house, or fence wrongfully, or to cut or take away any corn, grass, wood, or other goods wrongfully ; or to do any other unlawful act, with force and violence, against the peace, or to the manifest terror of the people, and being required or commanded by any of the civil authority, sheriff, deputy sheriff, selectmen, or constable by proclamation, shall not disperse, and peaceably depart to their habitations and lawful business ; or where three or more persons, being so assembled, shall do an unlawful act against any man's person, possession or goods, or against the public interest in any particular : such offenders before the superior or county courts, in the county where the offence is committed, may on conviction, be fined not exceeding ten pound each, be imprisoned not exceeding six months, or be whipped not exceeding forty stripes, at the discretion of the court, according to the nature and circumstances of the facts,

For the purpose of preventing the commission of this crime, any assistant, justice of the peace, sheriff, deputy sheriff, selectman, or constable, within the limits of their jurisdiction, are authorized and required on notice of any such unlawful and riotous assembly, to resort to the place, and among, or near as they can safely come  
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to the rioters, with an audible voice, command or cause to be commanded silence, whilst proclamation is making, and after that shall openly with audible voice, make or cause to be made proclamation in these words, or words to the like effect. In the name and by the authority of the State of Connecticut, I charge and command all persons assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains and penalties contained in the act or law of this state, entitled an act for preventing and punishing riots, and rioters.

If the rioters do not then disperse, such authority may command all persons to assist, and they may seize and apprehend them, and carry them before some assistant or justice of the peace, to be dealt with according to law. If any of the rioters are killed, maimed, or hurt in the attempt, the authority and those acting under them are fully discharged from any private damages or public punishment. If any person shall with force and arms, wilfully and knowingly oppose, obstruct, hinder or hurt any person, going to make proclamation as aforesaid, he shall be punished as a rioter, and if the rioters do not disperse, having knowledge that such proclamation has been hindered to be made, they shall be deemed guilty of a riot and punished accordingly. The prosecution must be within a year after the commission of the crime.

Here it may be remarked, that if three or more persons assemble to do an unlawful act, and none is done, and no proclamation is made, they are not punishable: if proclamation be made and they disperse without doing any unlawful act, they are not punishable; if on proclamation they do not disperse, they are punishable: if no proclamation be made and they do an unlawful act, they are punishable. At common law, there is a gradation of these crimes. An unlawful assembly, is where three or more persons meet with an intent to do an unlawful act, and do nothing. A rout is where they make some advances, but do not complete the act: and a riot is the completion of the unlawful act. Our statute comprehends all offences of this sort under the general name of riot.

### III. Breaches

III. Breaches of the Peace, are by statute defined to be tumultuous and offensive carriages, threatening, traducing, quarrelling, challenging, assaulting, beating, or striking any person. This comprehends assaults, batteries, wounding, and false-imprisonment : which we have already considered as private injuries, and which are punishable as crimes. The expression of tumultuous and offensive carriage, threatening, traducing and quarrelling are so general, that upon a literal construction, they might comprehend a vast variety of actions : but they are limited by the subsequent words, which provide that the offender shall pay to the party hurt, or stricken, just damages, and also a fine ; which imports that there must be personal violence, and that the mere offending a person, threatening to abuse him, or challenging to fight, unaccompanied by force and violence, will not be a breach of the peace ; but that a person must do an act, by which another is hurt or stricken, to make him guilty of a breach of the peace. The general rule therefore, in the construction of this statute seems to have been this, that where a person does an act which amounts to an assault and battery at common law, he is guilty of a breach of this statute. And this seems to be a rational construction, for public justice does not require that the quarrelling, scolding and abusive conversation unaccompanied by violence, among neighbours, shall come under the animadversion of the law. Of assault and battery we have fully treated in considering private injuries. A fighting of two persons by consent, is a breach of the peace. Under this statute may be comprehended the common law offence, of affray, which signifies the fighting of two or more persons, in some public place to the terror of the people.

The punishment for these offences, is a discretionary fine, according to the merits of the offence ; considering the party smiting, or smitten ; the instrument, danger, time, place, and provocation. If an indiar, negro, or mulatto servant, or slave, shall be guilty of this crime, he shall be punished by whipping, at the discretion of the court, not exceeding thirty stripes.

By statute, sheriffs and constables have the power, and it is their duty

\* Statutes, 188.



duty to prevent and suppress breaches of the peace, and may apprehend the offenders, and carry them before proper authority. By common law a private person is justified in endeavouring to separate the combatants, let what will be the consequence, to hold them to prevent them from fighting, to stay them till the heat be over, to confine them till they can deliver them to a constable, or bring them before a justice of the peace. If in doing this he unavoidably hurt the person, he is excusable : but if the person hurt him he may have his action. By common law sheriffs, and constables may break open houses to suppress breaches of the peace, and if any person be dangerously wounded, they as well as private persons may hold the offender and carry him before proper authority.

The law has provided certain measures, which are calculated to preserve the peace. • It is enacted by statute, that surety of the peace, or good behaviour, shall be granted, as the merit of the case shall require, by any assistant or justice of the peace, against all persons who by threatening words, turbulent behaviour, or actual violence, or by any other unlawful action, shall terrify, or disquiet any of the good people of this state ; and also against common barrators, who frequently stir up, and maintain suits at law, in courts or quarrels, and parties in the country : as also against such as invent and spread false reports, whereby discord arises, or may arise among neighbours : as also against such as are of evil name, or fame generally, for maintaining, or resorting to houses of bawdry, and incontinency : also against night-walkers, that are of evil name or report generally, or such as eve-drop men's houses, or cast carts into ponds, or commit other such like misdemeanors, outrages, or disorders in the night season : also against idle persons, drunkards, libellers, and against such like offenders. ¶ If any person have just reason to fear, that another will do him a corporal injury, by killing, beating, or imprisoning him, or that he will procure others to do it, he may make complaint to an assistant or justice of the peace, and upon making oath that he is in fear of death, or bodily harm, and will shew that he has just cause to be

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so, by reason of the other's threats, menaces, attempts, or having lain in wait for him, and that he does not require such surety of malice or mere vexation, then such assistant or justice may require the party complained of, to find sureties of the peace.

In all instances where the public peace only is affected, the most usual mode of proceeding is by information, and complaint from some informing officer. At common law any justice of the peace, may officially bind all those to keep the peace, who in his presence make any affray, or threaten to kill, or beat another, or contend together with hot, and angry words, or go about with unusual weapons, or attendants, to the terror of the people—all such as he knows to be common barrators, and such as are brought before him by a constable, for a breach of peace in his presence. From the expressions of the statute, it would seem a rational construction that an assistant or justice of the peace, should have the power to compel a person to find sureties of the peace, or good behaviour, in all the cases mentioned in the statute, which happen in their presence, or of which they have personal knowledge: but that in other cases the information should be by a proper officer. Where a private person is in danger, he may prosecute in his own name.

Upon proper complaint, or personal knowledge, as the case may be, an assistant, or justice of the peace may issue a warrant to some officer, to apprehend the person complained of, and from his own knowledge, or due proof of the facts charged, he may order such person to become bound with good and sufficient surety, or sureties, in a recognizance of a proper sum, conditioned that he shall carry good, and peaceable behaviour, towards all the subjects of the state, and if the process be on information of some private person, especially towards him, and if on the information of some public officer, to abstain from doing the particular acts complained of, and appear at the next court of common pleas, and take up his bond, unless the court shall order a continuance of it; which proceedings must be certified to said court. If the condition of the recognizance be broken by a breach of the peace, or doing that particular act, which

which the person was bound to avoid, or by an actual violence, or even menace, or assault upon the private person, who demanded it, then the recognizance is forfeit, and becomes absolute, and an action can be brought for the recovery of the penalty. The court to whom the recognizance is returned, may order a continuance of it, if they think proper, for the purpose of restraining the offender, but if he appears and moves to be discharged, and no proof is had of a forfeiture, or no sufficient objection shewn, he may be discharged. If the recognizance be taken to a private person, he may discharge it. If the party recognized does not appear in person it will be a forfeiture of the bond.

If the person complained of, or brought before an assistant or justice of the peace, and being ordered to find sureties of the peace, or good behaviour, shall refuse, the court may commit him to the common goal, there to remain until delivered by due order of law.

IV. *f* The refusal to assist a sheriff in the execution of his office and duty, if the person be of age and capacity, and commanded, subjects him on conviction, to a fine not exceeding ten pounds. The refusal to assist a constable is punishable by a fine of ten shillings, but if it appear to be done wilfully, contemptuously or obstinately, the fine may be forty shillings.

\* When in case of great opposition, the sheriff raises the militia of the county, any commissioned officer refusing to obey, is punishable by a fine not exceeding twenty pounds, and every soldier by a fine not exceeding three pounds, and all charges and damages occasioned thereby.

V. *u* Obstruction of lawful process at common law, is deemed highly criminal, and renders the party a partaker of the crime of him who was about to be arrested. Our statute law has provided, if any person shall abuse any magistrate, or justice of the peace, or resist and abuse any sheriff, constable or other officer in the execution of his office, he shall find sureties for the peace, and good behavior, until the next county court in the county, and on refusal may be committed to the common goal, there to remain till the next court; who may take cognizance of the wrongs and abu-

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<sup>1</sup> *f* Statutes 224.    \* *Ibid.* 224.    *u* *Ibid.* 189.

ses done to such officer, or officers, and inflict on him such penalty, as the merit of the case shall deserve, not exceeding ten pounds.

VI. \* Escape of a person legally arrested, upon a criminal process, by eluding the vigilance of the keepers, before he is put in prison, is an offence at common law, punishable by fine, and imprisonment. Officers having arrested a criminal, and negligently permitting him to escape, are punishable by fine. † If the officer retake the prisoner on fresh pursuit, before he gets out of his sight, it will excuse him; but if he gets out of sight, tho the officer retake him, or kill him in the pursuit, it will not excuse him. ‡ If the escape be voluntary, by the consent, and connivance of the officer, he is punishable in the same degree, as the offence of which the prisoner escaping was guilty; but cannot be punished till the original criminal be convicted of the crime for which he was arrested; otherwise the officer might be punished for a crime, of which the person escaping was innocent; but before conviction the officer may be fined, and imprisoned for a misdemeanor.

VII. a Rescue is the forcibly, and knowingly, freeing another from an arrest, or imprisonment; and the rescuer becomes thereby guilty of the same offence as the person rescued; and punishable in the same manner, whether the crime be treason, murder, or a misdemeanor: but the principal must first be convicted, before the rescuer can be tried, for it may turn out that no offence was committed. Of course if he entirely escapes, the rescuer cannot be punished. Some further provision on this head is necessary.

VIII. b Breach of prison by the offender himself, when committed for any cause, was felony at the common law, or even conspiring to break it. This doctrine has never been recognized by our courts, nor do I know that any prosecution has ever been had for this offence. It might with propriety be deemed a misdemeanor at common law, and punishable by fine and imprisonment, but the legislature ought to take up this subject, and inflict a proper punishment on such an offence.

IX. c Libels are malicious defamations of any person, and es-

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\* 4 Black. Com. 129. † 1 Hal. 588. ‡ Hawk. P. C. 134. 1 Hal. P. C. 590. a Ibid. 607. Felt 344 b 4 Black. Com. 130. 1 Hal. P. C. 607. 2 Hawk. P. C. 123. c 1 Hawk. P. C. 193. 4 Black. Com. 150.

pecially a magistrate, made public either by printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule. The communication of a libel to any one person in legal consideration, is publishing it. The sending an abusive letter to a person, is as much a libel, as if it were printed ; because it has an equal tendency to break the peace. The nature of libels was fully investigated in considering them as private injuries, in a former part of our enquiries. It is sufficient now to remark, that there is a material distinction between the private action, and the public prosecution, in this respect ; that in a private action, the defendant may justify by proving the truth of the libel, but in a criminal prosecution, no proof will be admitted to prove the truth of the facts stated in the libel ; because the tendency to provoke and disturb the public peace, and not the falsity, is considered, to constitute the essence of the crime. There has never been a prosecution for this offence before our courts, and of course there never has been an express recognition of this doctrine of the common law. I do not see any just ground for the distinction, as to proof between a civil action and criminal prosecution. If the truth of the libel ought to excuse a person from paying damages to the party in a private action, it ought to excuse him from being punished on a public prosecution.

There has been a great dispute in England with respect to the power of juries in prosecutions for libels. It has been decided by Lord Mansfield, and sundry of the most eminent judges, that the jury are only to judge of the fact of publishing, and leave it to the court to decide on the face of the record, whether the writing be a libel. But a late act of parliament, has given the jury power to judge of the fact of publishing, and whether the writing is a libel. By the power which we consider juries to possess in this state, they would most unquestionably have a right to decide as to the fact of publishing, and also whether the writing be libellous.

Such is the law respecting libels that defame public officers, and private persons : but by the common law of England, all writings which are calculated to subvert the constitution or civil government, religion and morality, are deemed libels.

*e* All seditious writings respecting the government have been adjudged libellous: instances of which are very numerous in the British reports.

*f* All writings which reflect upon the christian religion, are deemed libels in England: and authors have been punished for blasphemous writings respecting the miracles of our Saviour, and the doctrine of the Trinity: but the court declared, that they did not intend to include disputes between learned men, upon particular controverted points, but they would not suffer it to be debated, whether to write against christianity in general was not an offence punishable by the temporal courts of common law. The statute law of this state, will comprehend every offence of this description.

*g* All writings which are calculated to destroy the principles of morality, are libels. This rule is not considered as extending to every immoral writing, but to those which are destructive of morality in general. Thus, the publication of obscene books, such as Rochester's poems, the fifteen Plagues of a Maidenhead, and Venus in the cloister, or the Nun in her smock, have been considered as libels, and punished by courts.

The punishment is fine, imprisonment, and pillory at the discretion of the court.

X. *b* Defamation of authority is punishable by statute, which enacts, that whoever shall defame any court of justice, or the sentence and proceedings of the same, or any of the magistrates, judges, or justices of any court, in respect of any act or sentence, passed therein, and be thereof lawfully convicted, before any of the general or superior courts, shall be punished by fine, imprisonment, disfranchisement, or banishment, according to the nature of the offence, and the discretion of the court. This statute is very ancient, and needs correction. The defamation of a court seems a very odd expression. A statute might define a reviling or vilifying of a court, which would deserve punishment.

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The same statute punishes as a public offence, private defamation : but this is obsolete.

#### CHAPTER ELEVENTH.

#### OF CRIMES AGAINST PUBLIC POLICY.

I. <sup>b</sup> **T**HE importation of convicts is prohibited by statute.—No person convicted of any crime in a foreign country, and sentenced to be transported abroad shall be imported into this state, and any person who shall import or bring into this state knowingly any such convict, or shall be aiding or assisting therein, shall forfeit and pay to the treasurer of the state, one hundred pounds for every such convict. On a prosecution for a breach of this act, the person prosecuted, is bound to prove that he had lawful right to import the persons, on whose account he is prosecuted, and that the same was not against the meaning of the statute. This act was passed in consequence of the importation of a cargo of convicts from Ireland.

II. <sup>c</sup> The importation of slaves into this State, has been prohibited by statute. There have been a variety of regulations on this subject. Slavery has never been expressly and directly authorised by statute, tho it was permitted previously to the revolution, and many laws were passed for the regulation of slaves, which indirectly established the right of holding them. In the year 1784, an act was passed prohibiting the importation of any negro, indian, or mulatto slave, by sea or land, from any place, to be disposed of, left or sold in this state, on penalty of forfeiture to the state, one hundred pounds for every slave so imported : and also an act that all children born of slaves after the first day of March 1784, shall be free on their arrival to the age of twenty-five years. In the year 1788, an act was passed, prohibiting all the citizens of this state, from being directly or indirectly concerned in importing or transporting, or buying or selling, or receiving on board his vessel, with intent to import or transport any of the inhabitants of Africa, as slaves or servants for term of years, on penalty of fifty pounds for every person so received on board, and five hundred pounds

<sup>b</sup> Statutes, 367. <sup>c</sup> Ibid. 358.

pounds for every vessel so employed, one half to the prosecutor, and the other half to the state.

It was also provided that if any person should kidnap, decoy, or forcibly carry out of the state, any free negro, indian or mulatto, or any person entitled to freedom, at the age of twenty-five years, inhabitants or residents in this state, or who shall be aiding or assisting therein, shall forfeit one hundred pounds to the use of the state, to be recovered on an information, presented by any friend of such person, with such sum in damages as the court should judge reasonable, to be given to such prosecutor for the use of such injured person or family, to be applied under the direction of the court, and the prosecutor to become bound with surety for the application of such money, before execution should be granted. And that every person possessed of a child, entitled to be free at the age of twenty-five years, should deliver to the town clerk, his name, and the age, name, and sex of such child, on oath, within six months from that time : and ever after within six months from the birth of the child, on penalty of forty shillings for every neglect, half to the informer and half to the poor of the town, where such child should live. Afterwards half of the penalty of one hundred pounds was given to the complainant. In 1792, an act was passed, that no citizen of this state, should transport from it, into any state, country or kingdom, or buy or sell with intent to transport, or sell if transported, or aid and assist in the transportation of any negro, mulatto slave or servant for years, on the penalty of one hundred pounds, one half to the informer, and the other half to the state.

The owners of slaves, may emancipate them, but must support them if they come to want, unless they are emancipated by the consent of the selectmen of the town, evidenced by their certificate ; but if the slave is not less than twenty-five years of age, nor more than forty-five, in good health, and desirous to be free, the owner may apply to the civil authority and selectmen of the town, and on proof of such fact it is their duty to give their certificate, and if he then emancipates such slave, he will never be chargeable with his support. Such is the situation of the Africans in this state. None can be imported or exported. All born since the first of March

\* Statutes, 369.

† Ibid. 388.

== Ibid. 421.



March 1784, are free. Death and emancipation will soon abolish a practice, which is equally repugnant to the dictates of sound policy, and the voice of humanity. But it ought to be remarked, that those who are yet slaves, are treated with proper kindness and are in general much happier than those who have obtained a liberty, which they know not how to use as not abusing it.

III. Horse-racing is prohibited by statute, which enacts, That the owner or owners of every horse or horse-kind, that shall be used, employed, or improved in horse-racing, by his, or their privity, or permission, whereon any stakes are held, or any bets or wagers laid, or dependent, either directly or indirectly, shall forfeit every such horse or horse-kind, or the value thereof. And that every person concerned in laying any bets, or wagers, on such race, or races, shall forfeit the sum of forty shillings, where the bet, or wager shall be forty shillings or less, and if more, the value of the bet or wager laid: one half of the forfeiture in case of a common informer, to him who shall sue for the same, and the other half to the public treasury, but if the prosecution be in the name of an informing officer, the whole penalty goes to the public treasury.

The horse-racing might tend to improve the breed of horses, by inducing the raising of the best kind for the race; tho it furnishes the most enchanting amusement to the people of many countries, yet when we consider how much it encourages the dangerous practice of gambling, and how much it promotes idleness, there can be no doubt of the propriety of prohibiting it: and while we are deprived of the pleasure of beholding the fleetness and agility of the noblest animals, we derive a consolation from the consideration, that the sacrifice is attended with salutary effects to the community.

IV. \* The suppression of mountebanks is effected by a statute declaring, that no mountebank, or persons whatever, under him, shall exhibit, or cause to be exhibited, on any public stage, or place whatever, any games, tricks, plays, juggling, or feats of uncommon dexterity and agility of body, tending to no good and useful purposes, but tending to collect together numbers of spectators, and gratify vain or useless curiosity, nor shall any mountebank, or any person under him, at or on any such stage or place, offer, vend or otherwise

wife dispose of, or invite any persons to be collected to purchase, or receive any physic, drugs, or medicine, recommended to be efficacious and useful in various disorders : and on conviction, the offender forfeits the sum of twenty pounds, to him who shall sue for it, and prosecute to effect : but if the prosecution is by an informing officer, the penalty goes to the county treasury : and if a servant, minor, or apprentice, under age, is guilty, the fine is to be paid by the parent, guardian or master, under whose direction the act is done, and execution is to be awarded accordingly.

V. Gaming is an amusement, the propensity of which is deeply implanted in human nature. Mankind in the most unpolished state of barbarism and in the most refined periods of luxury and dissipation, are attached to this practice with an unaccountable ardor and fondness. To describe the pernicious consequences of it, the ruin and desolation of private families, and the promotion of idleness and dissipation, belong to a treatise on ethics. Tho' laws are made to restrain this pernicious practice, yet so little disgrace attends it, that it is very difficult to carry them into execution.

It is enacted by statute, that if any person of whatever rank or quality, shall play at cards, dice, or tables, he shall pay a fine of twenty shillings for every offence of which he is convicted.— That the head of every family, where such game is used with his or her consent or knowledge, shall pay the same fine, for each time any such game is played in his or her house. That whoever shall sell any playing cards, or have them in his possession for sale, or shall offer them for sale, shall pay a fine of forty shillings ; that no taverner shall keep in or about his house, or any of the dependencies, any dice, cards, or tables, howls, shuffle-boards, billiards, coyses, keils, loggers, or any other instruments used in gaming, nor shall suffer any person resorting to his house, to use or exercise any of the said games, or any other unlawful game in his house, or dependencies, on penalty of forty shillings for each offence ; and every person convicted of playing cards, dice, or tables at a tavern shall incur the same penalty as for gaming at a private house, and for playing the other mentioned games at a tavern, the penalty of ten shillings, one half of the fines inflicted by this act, shall belong to the

the person who shall discover and give information of the offence, and the other half to the town treasury, and it is made the duty of informing officers, to enquire after and prevent all breaches of this law.

The law makes no difference, whether the playing be for money or amusement. The object seems to be, to forbid playing at such games for amusement, to prevent the introduction of the practice of playing for money. The consequence is, that the people are restrained from an amusement generally deemed innocent, to prevent the gradual approaches to guilt. But the prohibition of innocent amusements, to prevent those which are not so, will excite a dislike to the law and prevent its execution. The best policy would be to prohibit amusements in that stage when they may be deemed criminal, and leave to mankind the liberty of whiling away the tedious hours of life by innocent amusements; for then there will be a much greater probability, that the laws will be executed. The rigor of the laws in prohibiting amusements strongly speaks the puritanic spirit of the times in which they were made; but the observance of them at the present day, does not manifest much of the principles of puritanism.

VI. *§* Usury not only vacates the security for the debt, but is an offence punishable by statute. Every person who shall take, or receive in any way whatsoever, for the forbearance of the payment of money, or any other thing, above the sum of six per cent. for a year, and at that rate, for a greater or lesser sum, or for a longer or shorter time, shall forfeit the value of the goods or money lent or sold, one half to the public treasury and the other half to any informer who shall sue for and prosecute the same to effect.—A process is also prescribed by statute, by which offenders may be bound to their good behaviour, but this is obsolete.

VII. *§* Cheating, is the defeating of some person of his right, is an offence at common law, and punishable by fine, imprisonment and pillory. All deceitful practices, in defrauding or endeavouring to defraud another of his known right, by some artful device, contrary to the plain rules of common honesty, are deemed criminal. Such as playing with false dice; causing an illiterate person to execute a deed

deed, by reading it over to him in words different from what are written: persuading a woman to execute writings to another as trustee, upon an intended marriage, which in truth contained no such thing but a warrant to confess judgment; suppressing a will and the like.

VIII. *r* Fraudulent conveyances of real and personal property, and all contracts, judgments and executions made to avoid just debts, are void as relative to the persons intended to be defrauded; and all parties to such fraudulent conveyances, contracts, judgments and executions, being privy, who shall knowingly justify the same to be done bona fide, and on good consideration, or shall alien, or assign any estate so conveyed to them, shall forfeit one year's value of the rent of the land, or other profits of the same, the whole value of the goods and chattles, and the amount of the money contained in the covinous contract, and suffer half a year's imprisonment; the forfeiture to be equally divided between the party aggrieved and the county treasury.

IX. *f* Setting up lotteries, to sell or dispose of goods, or any thing whatever, or by wagers, shooting, or any other such way or exercise, to sell and dispose of money or any thing at adventure, or to set up notifications, to entice people to deposit or risque property for such purposes, subjects the offenders to forfeit the value of such goods, money or other things so disposed of; one half to the prosecutor, and the other half to the county treasury: and if common informers fail to prosecute, grandjurors are directed to make presentment. *r* To buy, sell, or dispose of lottery tickets, issued by the authority of any state, but this, subjects the offender to a penalty of forty shillings, half to the town where the offence is committed, and half to the informer, without appeal.

X. *u* No briefs, craving the charitable contribution of the people in any towns or societies, shall be read or attended to, without the allowance of the governor and council, and by them directed where it shall pass, on penalty of five pounds, to be forfeited by the person who shall read and publish such brief, not allowed and directed as aforesaid, one third to the informer, and the rest to the county treasury, unless it be done in some town or society, upon

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some special occasion, for any of their own distressed or afflicted inhabitants.

XI. *u* Nuisances were defined, when we treated of them as a private injury. When they affect the public, a punishment is provided by statute. If any person block up or lay, or cause to be laid in any highway, any stone, trees, or timber, or by digging, or any means obstruct, hinder or endanger the passage of travellers in such ways, he shall on conviction pay the charge of repairing, clearing, or filling up the same, and incur the penalty of twenty shillings, one half to the town treasury and the other half to the informer. If any person erect or set up any gates, bars, rails, or fence upon, or across any highway, country road or street, or continue any such to the annoyance and incumbrance of the same, it shall be deemed a common nuisance, and be lawful for any person to pull down and remove the same.

If any person shall obstruct, stop or dam any river, brook, stream, or run of water, out of its natural course, without liberty of the town where they are; and if any person shall dam, stop, or obstruct any brook, river or stream, or run of water, or shall by daming, digging, or the like, turn them out of their natural course, to the prejudice of any town, proprietors, or particular persons, the same shall be deemed a common nuisance, and may be removed as such; and the person making such nuisance after warning, shall remove the same, upon penalty of five shillings per week, during its continuance, one half to the complainer, and the other half to the town treasury, where the offence is committed: provided that the act shall not be understood to hinder any dam for a mill or other use, where no special damage accrues to any person.

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#### CHAPTER TWELFTH.

#### OF CRIMES AGAINST PUBLIC JUSTICE.

I **B**RIBERY, is where a judge, or other person concerned in the administration of justice, takes an undue reward, to influence

*u* Statutes, 181.

\* 1 Hawk. P. C. 168.

4 Black. Com. 139.

his behaviour in his office, and is punishable at common law, by fine and imprisonment, <sup>1</sup> and those who offer a bribe, which is not accepted, are punishable in the same manner. Our legislature have made no law on this subject, nor has there ever been a prosecution of this nature before our courts. Bribery and undue influence in the election of officers, were considered when we treated of that subject.

II. <sup>a</sup> Barratry at common law, is the frequent stirring up suits and quarrels, between the people, either at law or otherwise, and is punishable by fine and imprisonment, and if the barrator be a lawyer, by disability to practice. The suing of a person in the name of a fictitious plaintiff, or one ignorant of the suit, and who has given no authority to do it, is not only a civil injury, but an offence at common law.

<sup>a</sup> Barratry by statute, is the vexing of others with unjust, frequent and needless suits, and is punishable by a fine of five pounds, payable to the state treasury, and to become bound before the court, by whom he is convicted, to his good behaviour, for one year at least, and on refusal, to be committed for that time, or till he comply.

III. <sup>b</sup> Vexatious suits by statute are, where a person wittingly and willingly wrongs another by commencing and prosecuting any action, suit, complaint or indictment in his own name, or in the name of others, with intent unjustly to vex and trouble him, and the punishment is treble damages to the party injured, and a fine of forty shillings to the county treasury, and for the third offence, he shall be adjudged and proceeded against as a common barrator.

IV. <sup>c</sup> Maintenance is an officious intermeddling in a suit, that no way belongs to one, by maintaining, or assisting either party with money, or in any other way to prosecute or defend it, and is punishable at common law by fine and imprisonment. To maintain the suit of a relation, servant, or poor neighbour out of charity and compassion, is not criminal.

V. <sup>d</sup> Champerty, is where a bargain is made with a plaintiff or defendant, to divide the land or other matter, in contest, be-

<sup>1</sup> 3 Inst. 147. <sup>2</sup> 4 Black. Com. 134. <sup>a</sup> Statutes, <sup>1</sup> 14. <sup>b</sup> Ibid. 208.  
<sup>c</sup> 1 Hawk. P. C. 249. <sup>d</sup> 4 Black. Com. 134. <sup>d</sup> Ibid. 134. <sup>e</sup> Hawk. 255.

tween them, if they prevail at law, and upon this consideration that the champertor carry on the suit at his own expence. This offence is punishable at common law, by fine and imprisonment.

VI. *Conspiracy*, is a combination to indict or procure to be prosecuted an innocent man falsely and maliciously, and who is accordingly indicted, and acquitted. There must be two or more conspirators, no probable cause of complaint, circumstances to evidence a malicious design, an actual indictment, and an acquittal. We have considered the private remedy in favour of the party injured—The public offence at common law is punished by fine, imprisonment, and pillory.

VII. *Embracery*, is an attempt to influence the jury, corruptly to one side, by promises, persuasions, entreaties, money, entertainments and the like, and the punishment at common law is fine, and imprisonment.

VIII. *Oppression* at the common law, is the tyrannical and wicked partiality of judges, justices, and other magistrates in the administration of justice, and under colour of their office, and punishable by fine and imprisonment.

IX. *Extortion*, is where an officer unlawfully takes by colour of his office, from a man, any money, or thing of value, that is not due, or more than is due, or before it is due, and is punishable by fine and imprisonment. For the common law offences mentioned in this chapter I never heard of any prosecution in this state.

#### CHAPTER THIRTEENTH.

#### OF CRIMES AGAINST PUBLIC MANNERS.

I. **T**HE neglect of the education of children, may be deemed criminal, when so many thousand volumes have been written, to prove the importance of the duty. Our law however only requires parents to give their children that kind of education, which qualifies them for the duties of common life, and leads the way to higher improvements, where they possess genius and taste for literature. But this would have been ineffectual, had they not also furnished the means of communicating this instruction.

*4 Black. Com. 136. 1 Hawk. P. C. 242. 4 Black. Com. 141.*  
Haw. C. 170.

*i* All parents and masters of children, are required to teach and instruct, or to cause to be taught and instructed, all children under their care, according to their ability, to read the English tongue well, and to know the laws against capital offences, or at least to instruct them in the rudiments of religion, by learning them some short orthodox catechism. A neglect of this duty, subjects them to a forfeiture of twenty shillings for the use of the poor the town.

All parents and masters shall employ and bring up their children and apprentices, in some honest and lawful calling, labour, or employment, profitable to themselves and the state, and on failure the selectmen may bind them out.

II. *A* The stubbornness of children, is punished in aid of family government; and when a child or servant, upon a complaint made, shall be convicted of any stubborn or rebellious carriage, against their parents or masters, before any two assistants, or justices of the peace, they are authorised on conviction, to commit such child or servant to the house of correction, there to remain under hard labour and severe punishment, so long as said authority shall judge meet, who on reformation of such children or servants may order their discharge.

III. *I* All rogues, vagabonds, and sturdy beggars, and other lewd, idle, profane, dissolute and disorderly persons, that have no settlement in this state, may by an assistant, or justice of the peace, be sent to the workhouse of the county, and there be kept to hard labour, under the regulations of such workhouse until released by order of law.

All persons using or pretending to use any subtle craft, juggling, unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending they can tell destinies, fortunes, or discover where lost or stolen goods may be found: also common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common nightwalkers, pilferers, wanton and lascivious persons, either in speech or behaviour, common railers or brawlers: also such as are guilty of reviling and profane speaking, or neglect their callings, mispend what they earn, and do not provide



provide for themselves and the support of their families, upon due conviction of any of the offences or disorders aforesaid, may be sent to the workhouse. There can be no doubt but that most of the acts and characters above described, are the proper subject of legal animadversion ; but such general expressions give such a boundless latitude of construction, and discretion to courts, as to be incompatible with civil liberty. The crimes ought to be defined for which such severe punishments are to be inflicted, and this would be a very proper subject for legislative consideration.

IV. The law respecting taverns is calculated to render them useful and convenient for the community without encouraging drunkenness and idleness. Upon nomination by the civil authority and selectmen of the town, the county courts have power to grant licences to the persons nominated, to continue in force one year, and shall take a bond in the sum of twenty pounds, conditioned for the observance of the laws respecting taverns. No licensed tavern-keeper shall suffer any minors, apprentices, servants, or negroes to sit drinking in his house, or to have any strong drink, without special order and allowance of the parents and masters, upon the penalty of six shillings for every offence : nor shall they suffer any persons, (strangers and travellers excepted,) to meet in companies in their taverns, on the evening preceeding or following the Lord's day, or any day of public fasting, upon penalty of forty shillings : but if such tavern-keeper forbid their continuance in his house, and give notice to some constable he shall be excused from the penalty. If any inhabitant, or person belonging to a town, be found in any tavern, the night preceding or following the Lord's day at any time ; or after nine o'clock, on any other night, except for some good reason, or extraordinary occasion, he shall incur a penalty of three shillings. It is the duty of constables to make search and command such people to depart, and on their refusal, may arrest and keep them, till they can carry them before an assistant or justice of the peace, and on conviction, they shall incur a penalty of six shillings. No tavern-keeper shall suffer any inhabitant of a town, or coming from another town, to sit drinking, or tipping in his house or dependencies, or to continue there more than the

space

space of an hour at a time, (travellers or persons on business, or any extraordinary occasion excepted,) on penalty of six shillings.

The civil authority, selectmen and grandjurors may cause the names of tavern-haunters to be posted at the doors of taverns, forbidding tavern-keepers to sell them strong drink, and if a tavern-keeper afterwards sell any strong drink to a person so posted, he shall pay a fine of three pounds : and if such tavern haunters do not reform, they may be compelled to find sureties for their good behaviour, and on failure may be subjected to pay a fine of twenty shillings, or sit in the stocks two hours. These laws were made at a very early period of our government, and evidence the disposition of our ancestors, to prevent the destructive practices of idleness and drunkenness. They are unquestionably too severe and rigid, and unnecessarily abridge the liberty of the people, in regard to amusements. The consequence is, that they are little regarded, prosecutions have rarely been had upon them for many years, and they may generally be considered as obsolete. It would be much sounder policy to repeal these laws, and establish such regulations respecting taverns, as are really necessary to prevent their abuse, and enforce the thorough execution of them. But the making of such rigorous laws, that mankind condemn them, and are disinclined to their execution, is in effect to leave the subject without any regulation or restraint.

V. \* Unlicensed houses, are restrained by a statute enacting, that no persons, (except such as have a licence from the court of common pleas of the county in which they dwell, for keeping a tavern or house of public entertainment,) shall be a common victualler, inholder, taverner, or seller of wine, or ardent spirits, beer, ale, cyder, or any other strong liquor by a less quantity than a pint of wine, or ardent spirits, a quart of metheglin, cyder, beer or such like liquor, and that delivered and carried away at one time, on penalty of twenty shillings for every offence, payable to the treasury of the town where such offence is committed. And any one assistant or justice of the peace, has power to hear and determine all breaches of this act, and no appeal lies from his judgment. The oath of one credible witness is declared to be sufficient evidence; and

and constables and grandjurors are directed to search after and make due presentment of all breaches of this law.

VI. • Drunkenness is where a person by the use of *spiritous liquors*, is bereaved and disabled in the use of his reason, and understanding, appearing by his speech or behaviour, and is *punishable* by a fine of eight shillings, payable to the town treasury, for the use of the poor, and for want of goods whereon to make distress, the offender may be set in the stocks, not exceeding three hours, nor less than one.

VII. ♀ If any man shall wear woman's apparel, or any woman man's apparel, such offenders on conviction shall be *corporally punished* or fined at the discretion of the county court, not exceeding five pounds for the use of the treasury of the county, where the offence is committed.

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CHAPTER FOURTEENTH.

OF CRIMES AGAINST THE PUBLIC HEALTH.

9 T O prevent the spreading of infectious disorders, it is provided that when any persons coming from abroad, or from any town or place in this state, are visited, or lately have been visited, with the small pox, or other contagious sickness, or that may justly be suspected of any such infection, which may probably be communicated to others, the selectmen are empowered by warrant from two assistants or justices of the peace, to take care and make the best provisions to preserve the inhabitants from infection, by removing and placing such infected persons in a separate house, or houses, and to take care of them, by providing nurses and necessaries at the charge of the parties, their parents or masters, if able, if not, at the expense of the town where they belong. The accounts to be adjusted by the authority who granted the warrant and the money to be levied by distress signed by them. When it shall be necessary for the taking care of the sick, two assistants, or justices of the peace, may by warrant directed to the sheriff or constable, and with the advice and direction of the selectmen of

the town where such sick are, to impress and take convenient houses, lodgings, nurseries, and necessaries, for the accommodation of the sick. If in towns visited by sickness, nurseries cannot be procured, and there is danger of suffering, proper persons and necessaries may be impressed in any other town, by warrant from the authority aforesaid.

If any persons, seamen, or passengers in any ship or vessel, arriving at any harbour or port in this state, happen to be visited with the small pox, or other contagious disorder during the voyage, or come from any place where such sickness prevails; or if any person shall come from any town or place in this, or any neighboring state or country, where such infectious disorder does prevail, or has lately prevailed, or when any person or family may be justly suspected to have taken such infection, it shall be in the power of the selectmen of the town, to order such persons or family to confinement in such vessel and such place, or house, and for such time as they shall think proper: and if necessary, on application to one assistant or justice of the peace, or more if convenient, who are authorized by warrant directed to the sheriff or constable, and for want of such officers, or for any special reason, to some suitable person to remand such persons on board again, or to confine them in places assigned them on board or on shore, and to prevent persons from going to or from them contrary to orders given.

If in any places, the distress and difficulty shall be so great as to require further provision, the governor with the advice and consent of the council, may give such orders and directions, as they think fit, to prevent the spreading of such infection, or any thing relating thereto.

If any person shall transgress any rule or method, made by this act, or provided by virtue thereof, by refusing to nurse or tend a sick person, or by resorting to such sick persons, or the places where they are, or shall without licence from the civil authority, or selectmen, come on shore from such ship or vessel, or shall go from any other place, where they are confined, or being appointed to tend, and be with such sick persons, shall go from the places or houses to any

person has been involuntarily exposed to and probable has taken the infection in the natural way. Whenever the civil authority and selectmen shall grant liberty to inoculate, they are directed and required to assign the place, house or houses, where it shall be carried on, and the infected persons kept : and to appoint and approve nurses and tenders, and give orders respecting the time the nurses and tenders, and the persons infected, shall continue in the places appointed, and also respecting their cleansing and coming out : and such other orders and directions as they shall judge most expedient for preserving the inhabitants from taking such infection. Every person who shall voluntarily take, receive, give, or communicate the small-pox by inoculation, or be aiding and assisting therein, shall forfeit and pay to the treasurer of the town, fifty pounds for every offence ; and every person who shall transgress any of the rules or orders made or given, in pursuance of this act, shall forfeit to the treasurer of the town where the offence is committed, a sum not exceeding twelve dollars, nor less than one, to be recovered before an assitant or justice of the peace, without appeal, and on refusal, to pay, may be disposed of in service to any inhabitant of this state, for the cost and forfeiture. Upon prosecution for receiving, or communicating the small-pox by inoculation, if probable proof be adduced, the person prosecuted shall be deemed guilty, unless he will exculpate himself on oath. If any person shall be inoculated out of the state, and come into any town in this state, he shall forfeit to the treasurer of such town, one hundred and fifty dollars, to be proved as aforesaid.

Besides these offences created by statute, which I have particularly investigated, there are sundry of a nature hardly important enough to be treated of in an elementary work. It will be sufficient to mention them and refer to the statutes for an explanation. These are statutes to regulate the assize of brick, for the inspection of provision, directing the marking of cattle, sheep and swine, to authorise the restraint of mad dogs, to prevent encroachments on highways, to prevent the exportation of raw hides, to regulate mills and millers, weights and measures, to prohibit the tanning of leather without licence from the county court, and the selling of leather unsealed.

## CHAPTER FIFTEENTH.

## OF MISDEMEANORS.

WE have considered all the crimes which are expressly defined by statute or common law, we have seen that the existence, the peace, the good order and the stability of the government, and the rights and happiness of the citizens, are effectually guarded and protected, by the terror of penalties and punishments. But as it has been considered to be impossible to designate every action, that deserves punishment, courts of law have assumed a discretionary power of punishing those acts which they deem criminal, (tho warranted by no express law) as misdemeanors at common law. It has therefore been adopted as a general maxim, that all kinds of crimes of a public nature, all disturbances of the peace, and all other misdemeanors of notoriously evil example, may be prosecuted as public offences—but injuries of a private nature, which do not concern the public, cannot be punished as misdemeanors. The punishment to be inflicted, must be fine, imprisonment and pillory, which are the common law punishments. It has also been laid down as a general principle, that every crime committed against the law of nature may be punished at the discretion of the judge, where the legislature has not appointed a particular punishment.

Our courts have recognized this doctrine of the common law; but they ought to exercise such power with great circumspection, and caution. It appears to me not only incompatible with justice, and dangerous to civil liberty, but unnecessary for the preservation of government. The supreme excellency of a code of criminal laws consists in defining every act that is punishable with such certainty and accuracy, that no man shall be exposed to the danger of incurring a penalty without knowing it, and which shall not give to courts an incalculable latitude of construction, with respect to the conduct of mankind, and an unbounded discretion in punishment. Upon the principle adopted respecting misdemeanors, a man may do an act, which he knows has never been punished, and against which there is no law, yet upon a prosecution for it, the court may by a determination subsequent to the act, judge it to be

<sup>a</sup>  
 2 Hawk. P. C. 20. 4 Black Com. 218. / Kaimes' principles of  
 of Equity, 180.

a crime, and inflict on him a severe punishment. This mode of proceeding manifestly partakes of the odious nature of an *ex post facto* law, and subjects a man to an inconvenience which he could not possibly foresee, or calculate upon, at the time of doing the act. Where the law is explicit, and a man knows the consequence of doing a certain act, he cannot complain if he is subjected to suffer the punishment to which he has knowingly exposed himself; and the risque of which he took into calculation at the time of committing the crime. But to punish a man, when he could not know that the act was the subject of criminal jurisprudence, cannot be deemed consistent with reason or justice.

Courts of law, ought always to be under the guide and restraint of strict rule, and precise definition: they ought never to be allowed to depart from the well known boundaries of express law, into the wide field of discretion. If they are accustomed to the exercise of such a power in one instance, there is reason to apprehend the extension of it to others, and that the law instead of being founded on plain and fixed principles, will be as uncertain as the whim and caprice of the court. There certainly is danger to be apprehended from the exercise of such a power in times of convulsions, when the spirit of party runs high: for then it is very possible that courts, influenced by political prejudice, might punish with great severity, actions which are very innocent in a moral view. No man can feel safe and quiet, when he knows that courts have a power over him, the extent of which is so undefined, and the consequence so uncertain, that he cannot know the one, or calculate upon the other. But when it is considered, that this power is unnecessary for the public welfare, it is the more extraordinary that it has ever been exercised. Society can never be in danger from an inability, or want of laws to punish a single crime. Whenever an act is done, of such a nature as merits punishment, the legislature may promulgate a law rendering it criminal and punishable in future, if it be probable that the repetition of such acts, may endanger the public peace and happiness: But if there be no probability that such acts will be so frequent as to produce some political inconvenience, there is no necessity to punish it: for punishment is not

to be considered as an act of vengeance, merely to punish a man because he has done wrong, but the object is to punish acts, the probable repetition of which, will injure the rights of the people and disturb the peace of the government. As then no ill consequence can result from leaving unpunished the single commission of crimes, which deserve to be punished, and as the legislature can in all cases make laws expressly defining the acts which are to be deemed criminal, before any political mischief can be produced, it is much better to deny to courts this discretionary power of punishing the acts of mankind, as criminal, by an *ex post facto* determination, and leave it to the legislature to ascertain what acts, which are not now punishable, shall hereafter be punished

I would not intimate that the courts in this state have abused this discretionary power. I shall mention one instance where a prosecution has been had, which may serve to illustrate this doctrine, and perhaps lead to the unfolding, and establishing principles which may be more accurate and definite. Information for a misdemeanor at common law, was brought against a man, and a woman who kept his house, for confining his wife in a cage a number of years, and abusing her. On the trial, the husband attempted to justify his conduct, by shewing that the confinement was necessary on account of her distraction, and that she was treated with all possible tenderness. It is probable that he would have been acquitted, had not the tide of popular opinion and prejudice, been strong against him. The conviction however was founded on the principle, that the treatment was abusive, and the confinement unnecessary. The court considered this to be a misdemeanor at common law, and fined the man a large sum, and inflicted imprisonment on the woman that kept his house.

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#### CHAPTER SIXTEENTH.

##### OF THE AGE AND CAPACITY TO COMMIT CRIMES.

**T**O constitute a crime, it is necessary that there should be a vicious will, and an unlawful act. Where the will is not exercised, there



there can be no criminality, and as it is impossible generally speaking to discover the intention of the mind, in any way but by an overt-act, this is with propriety made the criterion by which human tribunals judge and decide with respect to crimes, tho there can be no doubt, but in a moral view, that the person who has an intention to commit a crime, and is prevented by some intervening circumstance, is as guilty as if he had done the act.

That exercise of the will which is essential to constitute a crime, may be prevented, where there is a want of understanding, where the act is the result of misfortune, accident, or mistake, or where it is done by compulsion.

\* Infancy is where the exertion of the will is wanting, on account of a defect of the understanding. Infants under the age of seven years are supposed to be totally incapable of committing a crime. Between the age of seven and fourteen years, it is presumed that they are incapable; but as this is considered to be the doubtful period, his capacity of discerning between good and evil, must be the rule of determining. If an infant of this age appears to have a mischievous disposition, and to have conducted in such a manner as to shew himself possessed of discretion, he may be considered guilty of a crime. The rule cannot be dependent on the age of the delinquent, because we find great difference of capacity and discretion at the same age, but it must wholly depend on the strength of the understanding and the capacity to discern between good and evil. A girl of thirteen years, has been executed for killing her mistress, and a boy of nine years, and one of ten for killing their companions, because one by hiding himself, and the other, the body of him he had killed, they manifested a consciousness of guilt, and a discretion to discern between good and evil. A boy of eight years of age, has been executed for burning two barns, because he shew malice, revenge and cunning. In such instances, the malice supplies the want of age.

" Idiots and lunatics are incapable of exercising the will for want of understanding. If a man, in the full exercise of his reason, commits a capital crime, and before trial is bereaved of it, he cannot be

tried

1 4 Black. 22, 23. 1 Hawk. P. C. 2.  
1 Hal. P. C. 26.

" 4 Black. Com. 2.

tried on account of his incapacity to make his defence. If after he is tried and found guilty, and before judgment is pronounced, he lose his senses, judgment shall not be pronounced, and even after judgment, if he become distracted, he shall not be executed. When there is a doubt whether the party be compos or not, it shall be tried by jury. If a lunatic has lucid intervals of understanding, and during that time commits a crime, he may be punished, for he then has that exercise of will which constitutes criminality.

\* An unlawful act done by mere misfortune and accident, without any design, implies a total absence of the will, and therefore cannot be criminal : but here a distinction is to be made, if the mischief follows from the performance of a lawful act there is no guilt : but if a person is doing an unlawful act, and a consequence ensues which he did not intend, the unlawfulness of the act which he intended to do, makes him responsible for all that follows.

† Ignorance and mistake result from a defect of the will. If a man intending to do a lawful act, does that which is unlawful, the goodness of his intention removes all guilt : but this must be ignorance in point of fact, and not an error in point of law. If a man intending to kill a thief in his house, kills one of his own family, he is not guilty of murder : but if a man thinks he has a right to kill another for a mere provocation, and does it, this will not excuse him from the guilt of murder : for every one is bound and presumed to know the law, and ignorance of the law which every one is bound to know, excuses no man.

\* When the act arises from compulsion, or inevitable necessity, there can be no guilt, because it is against the will. Thus where a man is compelled to do an act by threats and menaces, which give him just cause to apprehend death or bodily harm, he is in many instances deemed innocent of a crime. But this must be a just and well grounded fear ; such as will affect a man of courage and firmness, and not merely such as will affect a coward. Therefore in time of war and rebellion, a man may be justified in doing many treasonable acts, by compulsion of the enemy and rebels, which would forfeit his life in time of peace : but this will not

B b b

justify.

\* 4. Black. Com. 26. † Ibid. 27. \* Ibid. 30.

justify every species of crimes : it extends only to those which are created by the positive laws of society : and acts which are criminal by the laws of nature, cannot be justified on this principle. Thus, if a man has no other way to save himself, than by killing an innocent person, he will not be justified in doing it : but ought rather to suffer, himself. He would be permitted to kill an assailant, as has been observed.

2 The only instance, in which the civil subjection that one person owes to another, will excuse from a crime, is in the case of husband and wife : for a son, or servant are never excused on account of the commands of the father or master. But such is the subjection, that a wife owes to her husband, that when she breaks the laws of society, by the coercion, command, or in the company of her husband, she is not deemed guilty of any crime, because she is supposed to have no will : but in respect of crimes, which are bad in themselves and prohibited by the law of nature, as murder, she shall not be excused. But in all cases where the wife offends alone, without the company or coercion of her husband, she is punishable for the crimes she commits.

3 In the case of drunkenness or intoxication, tho a man is thereby deprived of his reason, yet this circumstance is so far from extenuating, that it rather aggravates the guilt of the offence : and a man, when he is sober, shall be responsible for his conduct, when in a state of ebriety.

#### CHAPTER SEVENTEENTH.

#### OF PRINCIPAL AND ACCESSARY.

IN treating of principal and accessory, we observe that a man may be principal in an offence in two degrees : in the first, he is the actor and perpetrator : in the second, he is present, aiding and abetting. This presence, need not always be an actual standing by, within sight or hearing : for if one commit a robbery or murder, and another keep watch at a convenient distance, both are principals in the crime actually perpetrated. So a man need not be present at the death of a person, whom he murders by poisoning

2 4 Black. Com. 28    3 1 Inst. 247.    6 Fost. 315.    1 Hal. P. C. 615.

soning, laying a trap or pitfall, or turning out a wild beast, with an intent to do mischief.

\* An accessory, is the person who is not the chief actor, nor present when the crime was committed, but in some way concerned in it, either before or after. An accessory before the fact, is he who counsels, procures, or commands the crime to be committed, but is not present when the act is done : and the procuring may be by the intervention of a third person. To counsel or command another to commit a crime, renders one accessory to all that ensues upon that unlawful act : but not to any other distinct act. If one commands another to kill a third person, and he commits a robbery, the person commanding the murder, is not accessory to the robbery : but if he commands the killing to be done in a particular manner, and it is done in a different, he is an accessory to the fact, because it is substantially the same crime.

† An accessory after the fact is, where a person knowing the crime to be committed, receives, relieves, comforts, or assists the criminal. Any assistance to prevent his being apprehended, tried or punished, makes a person an accessory. As furnishing a horse to escape his pursuers, money, food, or any shelter to conceal him : or by open force or violence, to rescue or protect him, to convey instruments to him, to enable him to break goal, or to bribe the goaler to let him escape : but merely to relieve him by clothes or other necessities in goal is no offence ; because the crime consists in doing some act to prevent the criminal from being brought to justice. The crime must be complete when the assistance is given. Thus if one wounds another, and before his death, a person receives him, he is not accessory to the crime. But where the crime is completed, no relationship will justify the receiving of the offender, knowing the crime to have been committed, except it be a wife, who may receive and conceal her husband, because she is presumed to act under his coercion. But a husband may not receive his wife, a parent his child, a master his servant, and so of every other connection. This rule of the common law, seem to bear hard upon some of the degrees of relation. It would be cruel to oblige the father, to refuse to admit the son into his house, or to be-

come

come his accuser, when he had committed a crime which he abhorred from his heart. It is provided by statute in the case of theft, that a man shall be excused from making known the crime, if committed by any of his family. But where the feelings of affection do not impel a person to befriend a criminal, this law ought to be executed with the utmost rigor, and it would be a great check upon the commission of crimes, to convince every body, that the receiving, aiding, and concealing a criminal knowingly, subjected them to the same punishment as the criminal.

\* In treason there can be no accessaries, but all are principals. In manslaughter there can be no accessaries before the fact, because the crime is committed suddenly, without provocation. In all crimes of the lowest kind there can be no accessaries, neither can there be in trespasses, but all who are in any measure guilty, shall be deemed principals: because the law will not descend to distinguish the different degrees of guilt in the lowest crimes. Accessaries are punished in the same manner as principals, and the reason of making the distinction, is for the purpose of ascertaining the nature and denomination of crimes: that the accused may better know how to make their defence, and because no person can be tried, as accessory till the principal is convicted, or at least must be tried with him. A person indicted as accessory and acquitted, may afterwards be indicted as principal, and a person acquitted as principal, may be indicted as accessory after the fact. By statute, in the cases of theft, the concealer of the fact, and the receiver of stolen goods, may be proceeded against as principal, tho the principal be not convicted.

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#### CHAPTER EIGHTEENTH.

##### OF SUMMARY CONVICTIONS, AND CONTEMPTS.

**W**E have in this book of our enquiries, considered the various actions which are deemed to be crimes. In treating of these crimes, and in defining the power and jurisdictions of courts, we have described those courts which have cognizance of crimes and punishments. We are next to consider the various modes of proceeding to bring

bring criminals to justice. In this chapter, we shall discuss trials of a summary nature, and then proceed in the remaining part of this book, to consider trials of a regular nature.

A summary proceeding is authorised and directed by statute, without the intervention of a jury, in a different manner from the common law. We have but a very few instances of this nature. For the crimes of drunkenness, profane swearing and sabbath breaking, plain view and personal knowledge by an assistant or justice of the peace, shall be good and sufficient evidence for them to make up judgment against such offenders; but they must first issue a warrant to apprehend and bring the offender before them to be heard, and then they may convict them on their own personal knowledge, without calling upon any evidence.

Contempts are openly to insult or resist the powers of a court, or abuse the persons of the judges, and from the very nature of the offence, it is necessary that the mode of proceeding should be summary and instantaneous, in order to defend the rights, and support the dignity of the court. *f* The statute law provides, that if any person or persons, upon examination or trial, for delinquency or any other person not under examination or on trial, shall either in words or actions, behave contemptuously or disorderly, in the presence of any court, it shall be in the power of the court, assistant or justice of the peace, to inflict upon them such punishment as they shall judge most suitable to the nature of the offence, provided that no single minister of justice shall inflict any other punishment upon such offenders, than binding to the peace or good behaviour, to the next county court, putting them in the stocks not exceeding two hours, or imposing a fine not exceeding thirty shillings.

If any person insults the court, or any of its officers by abusive language, obstructs the business of the court, is guilty of any personal violence to any of the court, or any person present, or behave rudely, by making a disturbance, or is guilty of a breach of the peace, it shall be considered as a contempt in the face of the court, and they may instantly order such person to be apprehended, or if he leaves the court, may issue a warrant, and upon their own knowledge,

knowledge, may order such punishment to be inflicted upon him, as they think proper, pursuant to law. But tho' all courts but assistants and justices of the peace, have an unlimited discretionary power, yet this cannot be deemed to authorise them to inflict capital punishment. It can be supposed to extend only to fine, imprisonment, or such corporal punishment as may be suited to the nature of the offence, and according to the principles of the common law.

By the statute law, our courts have power to punish such contempts only, as are committed in face of the court, tho' by the English law a great variety of acts done out of the court, have been considered as contempts, and attachments are issued to bring the offenders before the court : such as the misconduct of inferior magistrates, the oppression of sheriffs and goalers, and the speaking contemptuously of courts : but I have never known an instance where the courts here have attempted to proceed in a summary way against any contempts, but those committed in the face of the court.

In addition to this it may be remarked, that by statute, courts have a power to inflict a fine not exceeding five shillings, upon an attorney who shall transgress the rules of pleading appointed by court, or for notorious misbehaviour and scandalous practices, may wholly suspend and displace them.

By the common law, if a witness refuses to be sworn or examined, or prevaricates when sworn he may be punished for a contempt. So if a juror refuses to be sworn or to give a verdict, or is guilty of any misbehaviour or irregularities, he may be punished for a contempt, and so may any attorney or party, who shall disregard and disobey the rules and orders of the court.

#### CHAPTER NINETEENTH.

#### OF THE SEVERAL MODES OF PROSECUTION.

**T**HERE are four modes of prosecuting crimes. By complaint or presentment of a grandjuror : by information exhibited by an attorney

attorney for the state : by information exhibited by the party injured, or some common informer in his own name and in the name of the state : and by indictment.

I. Complaint or presentment by a grandjuror is a mode of prosecution instituted and authorised by statute law, and is unknown to the common law. § Grandjurors are officers annually appointed by each town, and are the public informing officers. Their power has heretofore been considered as extending to the county, but later decisions, have confined them to their respective towns. Their duty, is at all times diligently to enquire after, and make due presentment of all misdemeanors and breaches of law, which come to their knowledge, whether the same were committed before they were chosen and sworn, or afterwards : which presentments are seasonably to be made to the court or some assistant or justice of the peace. If a grandjuror after he is sworn, neglects to make presentment of any breach of law that comes to his knowledge, he shall pay a fine of ten shillings. That the duty of grandjurors may be fully attended to and executed, they are required in their respective towns once in three months, in each year, to meet at such time and place as they shall appoint, to advise concerning such breaches of the law, as by their office they are to enquire after and present : and shall have power to call before them at such meetings, any person or persons, as witnesses, to examine them touching such delinquency, as they are enquiring after. If any person refuses to appear, being summoned by a warrant from an assistant or justice of the peace, (which the statute directs them to issue on request,) or refuses to be examined on oath, if required, such witness may by an assistant or justice of the peace, on conviction be committed to the common goal, to remain at his own cost, till he will give evidence.

By force of this statute, every grandjuror has the power of making complaint or presentment, of every crime that can be prosecuted by the state, to a single minister of justice, or if in session to the court, which has final jurisdiction, and upon such presentment, the offender except in capital cases, may be holden to trial. The usual practice however, is for grandjurors to exhibit their presentments to

assistants



assistants or justices of the peace, and if they have not cognizance of the crime, they must recognize the offenders to the court that has jurisdiction. This mode is found to be exceedingly convenient, because the high courts not being constantly in session, there would be a great part of time in which no complaints could be exhibited : while single ministers of justice can receive complaints at all times : by adopting this plan, therefore we answer this important purpose. We have in every town, a number of public informing officers, whose special duty it is, to make constant enquiry after, and due presentment exhibit of every crime that is committed : and also, courts who can always try, and punish offenders, or secure them for trial before the proper courts.

This practice of holding an offender to trial on the complaint of a single grandjuror, is unknown to the English law. In that country, all crimes of whatever degree, must be prosecuted by the information of the attorney general or by an indictment found by a grandjury ; which every court, having criminal jurisdiction, always summons to attend them, and it is only while thus attending the court, they have a right to find indictments for offences.

By statutes, constables and tythingmen, are made informing officers with respect to breaches of the Sabbath, and constables are in some other cases, as mentioned in the statutes.

II. Informations may be exhibited by the attorneys for the state in the several counties, who are officers appointed by the courts of common pleas in each county, to prosecute, manage, and plead in the county where appointed, in all matters proper for and in behalf of the state. There is no express statute authorizing this officer to make information for crimes : but this is fully implied in the description of their duty, for the word prosecute must carry the idea, that for such purpose, they may give information. And such has been the practical construction of the law, and it is now universally considered as a part of the office of attorneys for the state, in the respective counties for which they are appointed, to make information of all crimes to proper courts, on which final trial may be had, excepting in capital cases. They are not bound  
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by oath, to make information, nor is it considered to be absolutely a part of their duty, but a matter of discretion. It is not common for them to present informations to single ministers of justice, tho it is undoubtedly in their power. They commonly exhibit their informations to the superior and county courts, for offences within their jurisdiction, and not capital, upon which the person complained of, may be arrested by order of the court : and also, when offenders have been bound over to court, or committed for want of bail, by an assitant or justice of the peace, upon the complaint of a single grandjuror, they may exhibit new informations against them in their own name, or may proceed upon the complaint transmitted to the court by the authority binding them over, according to their discretion.

III. Informations *qui tam*, as they are commonly called, being in the name of some private persons and the state, may be exhibited for all offences where the statute creating and defining them, not only inflicts a public punishment, but gives to the party injured, or some common informer, some forfeiture or damages, or a part of some fine or penalty. In all informations of this kind, it is necessary that the informer bring his complaint in the name of the state as well as in his own name, and conclude to his damage, as in a private action. In every other respect, the form of the information as to the facts charged, must be the same as in criminal prosecutions, which will be fully considered in this chapter. But as this species of information is considered to be merely a civil process, under the controul of the party, I have fully explained it, when treating of private actions, and must refer to that part of our enquires for further illustration. I close my remarks on this head, by observing, that where a statute constitutes an offence without inflicting any particular punishment, courts will have a discretionary power in respect of the punishment : where no particular mode of prosecution is pointed out, it must be by the common informing officers : where the statute points out a punishment on the part of the public, and some separate or distinct damage or forfeiture to the party injured, then such party may bring a prosecution in his own name, and that of the state, to recover the damages or penalty to which he is entitled, and to subject the offender to the

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public

public punishment, if such party does not prosecute, or if an informing officer thinks proper, he may in behalf of the state, make presentment of the offence, on which the offender will only be subjected to the public punishment. But where the statute gives part of some precise sum, to be forfeited to the party injured, or some common informer, and the rest to the state, or some public treasury, then the prosecution can only be made in the name of such party or common informer, and cannot be made in the name of the public, because there will then be no person by the description of the statute, who can take a part of the penalty or forfeiture.

IV. An indictment is a written accusation, of one or more persons, of a crime preferred to, and presented on oath, by a grandjury. This mode of prosecution, might be practised for every species of crimes, if the courts thought proper : for it is provided by statute, that the superior and county courts shall have power to order a grandjury of eighteen, of those chosen by the respective towns in the county, or other sufficient freeholders of the county, where the court is sitting, to be summoned, empannelled, and sworn to enquire, and present such crimes and offences, as shall be cognizable by the courts respectively, where there shall be occasion. This act fully authorises the county and superior courts to proceed by way of indictment for every crime, but then it further provides that no person shall be held to trial, or put to plead to any complaint, indictment or accusation, for a capital offence punishable with death, unless a bill of indictment be found against such person, for such crime, by a grandjury legally empannelled and sworn : and that no bill of indictment, shall be presented by any grandjury so empannelled, unless twelve at least of the jurors agree to it. The operation of this statute is to make indictments by a grandjury necessary only in capital cases, and tho it has given courts the power to summon grandjuries in all cases, not capital ; yet as another mode by single grandjurors, has also been authorised, courts, to save the expense and trouble of grandjuries, have permitted all offences not capital, to be prosecuted by the presentment of single grandjurors, and the information of the attor-

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nies for the state, and call in grandjuries only in capital cases. When therefore a person is confined in goal, for some offence of a capital nature having been committed, as is generally the case, by some assistant or justice of the peace, upon the complaint of a grandjuror, the attorney for the state in the county, gives notice to the court, who order their clerk to issue a warrant to the sheriff, directing him to summon eighteen grandjurors, being freeholders, to appear before the court—The grandjury being summoned and appearing, they are empanelled and sworn. The chief justice then delivers them a charge to enquire after such breaches of law within the county, as are proper for them. He states to them the general principles of criminal law, and directs them how to proceed in their enquiries. The grandjury repair to some proper and convenient place, and the attorney for the state, lays before them such indictments as he thinks proper, against such offenders as are actually in goal, for it has not been usual to indict persons not arrested, tho it might be done. The party accused is brought before the grandjury, with all the witnesses, in behalf of the state. The attorney for the state, does not attend the examination, nor is the prisoner allowed any council at such time. The grandjury make enquiry only of the witnesses adduced against the prisoner, and none are ever admitted in his favour. This practice is grounded on the principle, that an indictment is only an accusation, the truth of which is to be afterwards tried and determined. The grandjury are to enquire only whether there be sufficient probable cause of guilt, to hold the person to trial; and not to decide whether he is actually guilty. They may therefore be justified in finding a bill of indictment against a person, upon such evidence as in their opinion would not be sufficient to convict him on a final trial. They ought not however to find indictments upon remote probabilities and slight presumptions, but probable evidence that the prisoner is guilty of the crime laid to his charge, will justify them in finding an indictment, for the purpose of subjecting him to a fair, regular, and legal trial for the offence: for the grandjury do not decide whether the prisoner is guilty, but only whether he ought to be tried:

After

After they have completed the enquiry, it is necessary that twelve must be agreed in finding the indictment. If they find it true, they indorse on the back of it, *a true bill* : if they find it untrue, then they indorse, *not a true bill* : they cannot find part and reject part : they cannot find the prisoner guilty of a different crime from that laid in the indictment, and indorse such finding thereon : but unquestionably, if on enquiry, it should be found, that the facts are not properly stated in the indictment laid before them by the attorney, or that the person ought to be indicted for a different offence, such alterations may be made as are necessary to comport with the truth. After the grandjury have agreed, they return into court and deliver up the indictment. If the finding be, *not a true bill*, the prisoner is dismissed ; if the finding be, *a true bill*, then he stands indicted, and is holden for trial.

Having enumerated the several modes of prosecution, I proceed to consider the form of the complaint, information, and indictment. As the same general principles apply substantially to the manner in which the offence must be laid in such species of prosecution, I thought best to consider them all together : remarking that the same general rules are applicable to each mode, and that the form only is to be varied, according to the names and characters of the officers and persons who prosecute.

Complaint, information, or indictment, (which I shall use indiscriminately in the residue of this chapter,) must contain sufficient matter stated with precision and certainty. They must set forth the christian name, the sur-name, the town, and the county where the offender belongs, if he lives in this state ; if in another state or country, he may be described either as a transient person, or his place of abode may be mentioned. This is required to identify the person of the offender. Every indictment must shew the day, the month and the year, in which the crime was committed : but on trial, it is not necessary to prove the crime to have been committed at the time stated, nor is it absolutely necessary to prove the precise time. It is sufficient to prove the commission of the crime, to have been previously to the indictment, and within such time that the prosecution is not barred by any statute of limitation.

Every

Every offence must be tried in the county where it is committed. It is therefore necessary that it be charged to be done in some town within the county where the trial is had: but in respect of proof, it is sufficient to shew that the fact was done within the county, tho it be not proved to be done in the town where laid. Where crimes are begun in one county, and compleated in another, the criminal may be tried in either county. Thus if a man wounds another in one county, and he dies in a different, the murderer may be tried in either county. If a man steal a horse or any goods in one county, and carry them through other counties, he is constantly guilty of the crime wherever he passes, and may be tried in any county through which he passes. So where a man steals in another state, and brings the property into this, he is considered as committing the crime here, and may be punished accordingly.

The crime must be set forth with clearness, and with an exact description of every circumstance, which is necessary to bring it within the law. There are certain technical terms, which have been appropriated to express the precise idea, which the law entertains of the offence, and which can be supplied by no periphrasis or circumlocution whatever. In drawing an indictment, we ought to consider the definition of the common law, or the description of the statute law of the offence, and then lay the facts in such a manner, as will constitute the very crime defined and described by law. In treason the indictment must alledge the fact to have been done traitorously and against his allegiance. In indictments for murder, it is necessary to make use of the word "murdered" and aver it to have been done with malice aforethought. The manner of the murder ought to be described, as whether it be done by some weapon, or poisoning. Where the death is caused by some wound, the indictment ought to shew the part of the body in which the wound was given, the length and breadth of the wound, or if a limb be cut off, it ought to be named, and the weapon ought to be described. If the person be poisoned, the manner ought to be described. If the death be caused by a pitfall, designedly laid and contrived, it ought to be stated. It must be expressly averred, that the deceased received the hurt which

which is laid as the cause of his death, and that he died of the hurt so received. In an indictment for mayhem, the word maim, must be used. For a rape, feloniously ravished, and carnally knew, or had carnal knowledge, are necessary : for a burglary, the words burglariously in the night season, must not be omitted, and for a theft, the words feloniously took and carried away, are always introduced.

These are all the instances in which the law has made it necessary to use certain words, that can be supplied by no other form of speech : and for every other crime it is advisable to make use of the expressions the law has, in describing them. No general expressions that a person has been guilty of a crime, nor any general stating of the facts will be sufficient : but the special manner of the fact ought to be set forth, so that the court may know what crime is committed, and that the record may be pleaded in bar of another prosecution, for the same offence. The charge must be laid positively, and not by way of recital, and the want of a direct allegation of any thing material in the description of the nature, substance, or manner of the crime, cannot be supplied by any intentment or implication whatever.

Tho the law requires an express allegation of the fact, that is charged as a crime, yet in the case of a common barrator, there seems to be an exception. He may be charged as a common barrator, which is a term of appropriate signification, but then previously to the trial, a note must be given of the matter intended to be proved. In an information for perjury, it is necessary to state the case in which the perjury was committed, the words, testified which were false, that it respected a point material in the case, and that the oath was legally administered. In a prosecution for a rescue, or escape, the information must state the offence, the person rescued was guilty of. In an indictment against an accessory, the crime of the principal must be stated, and his conviction, and that the person was accessory before or after the fact as the case may be, and the act done which made him accessory. If one material part of an indictment be repugnant to another, the whole is bad.

In every indictment, there ought to be a description of the persons referred to or mentioned in it, besides the offender. This certainly ought to be such in all cases, as to prevent another prosecution for the same offence. Therefore where it is possible to name such persons, it ought to be done: yet where from the nature of the crime it is difficult to know them, a general reference without naming them, will be good. So if a stranger unknown in the country, be found slain, or if the dead body of a person be so disfigured that it cannot be known, the indictment against an offender for killing some person unknown, will be sufficient. So where goods are stolen, and the owner unknown, the thief may be prosecuted for stealing the goods of some person unknown: but wherever the person is known, he ought to be named. But the description need only be such as will designate the person, and the same precision is not required, as in case of the criminal.

It is not necessary, that in an indictment for murder, it should be alledged that the person killed was in the peace of the state, tho commonly practised, for he might have been committing a breach of the peace. The indictment must describe the thing wherein the offence was committed. In a prosecution for forgery, the thing forged, should be fully described, and it will not be sufficient to say generally, that the offender forged a note, a lease, or other writing. So the thing stolen ought to be described, and the person to whom it belonged, with the value; which is necessary to determine the punishment and the restitution to be made.

In all cases where a crime is the joint act of a number of persons, or a number are present and assisting, so as to be responsible for the crime, they may be indicted and tried jointly or severally; for tho in consideration of law, the crime of one cannot be the crime of another, yet when several join in the commission of a crime, they may be joined in the trial: but where from the nature of the crime, it cannot be committed jointly, or where persons are joined in the indictment, where it appears the crime was not committed jointly it is ill, where several are joined in an indictment, part may be convicted, and part acquitted. Where sundry persons



persons are present, and aiding the commission of a crime, tho they do not the principal fact, yet they are to be charged as having done it, for the act of one is the act of all.

In all indictments and informations for offences, that amount to an actual disturbance of the peace, it has been the usual practice to charge the facts to have been done with force and arms, or to use words of the same import: but as this is a matter of form, I presume where the offence is otherwise well described, no court would judge the omission to be fatal; but that all offences shall be charged to be done against the peace, tho a matter of form has by long and immemorial usage been considered material and necessary.

In indictments and informations upon public statutes, it is not necessary to recite them; but if it be attempted, a misrecital in a material part will vitiate the indictment. In prosecutions grounded upon statutes, it is necessary that the indictment or information conclude against the form of the statute, otherwise it will not be considered as founded upon the statute. If an indictment conclude contrary to the form of the statute, and there be no statute against the offence, and the fact charged is an offence at common law, then the words, against the form of the statute, shall be rejected as surplusage, and the indictment be holden good at common law. Where an act is an offence at common law, and a statute prohibits and punishes it in a different manner, it will not take away the right of prosecution and punishment at common law, unless there be some words in the statute, which expressly or impliedly abrogate the common law—as by declaring that the crime shall be punished in no other manner, than the one prescribed by the statute.

In treating of indictments, I have been obliged to make use of the word felonious, which deserves a more particular consideration. Felony, according to the English law, signifies some crime, the punishment of which is a forfeiture of estate: but in common consideration, is a capital crime. In this state, in the title to two statutes, the word “felonies,” is used; the act for punishing divers capital, and other felonies, and the act constituting New-gate prison, and punishing divers felonies. The word is never introduced  
into

into the body of any statute, and is applied to the description of crimes not capital, and for which there is no forfeiture of estate. It is therefore apparent that this word cannot be used in the same sense, and for the same crimes as it is in England; nor does it with precision comprehend any class or description of crimes. A word of such uncertain meaning ought to be banished from a code of laws: for nothing produces greater confusion and perplexity, than the use of terms to which no precise and clear ideas can be affixed. I have therefore avoided the use of it, as much as possible, and it need not have been introduced in a treatise upon our laws, had not our courts introduced it into all indictments and informations, where it is used in England. The word feloniously is used in indictments for all capital crimes, and for many not capital, as for theft: but as felonious in an indictment, can mean nothing more than criminal, and does not designate the nature or class of the crime, it may be deemed unnecessary and immaterial, and ought to be exploded by our courts.

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#### CHAPTER TWENTIETH.

#### OF PROCESS AND ARREST.

**I**N this state, we know of no process, but a warrant issued by a justice of the peace, or an assitant, upon proper complaint and information: or by order of the superior and county courts, under the signature of their clerks, when information is duly exhibited to them. The warrant is subscribed by the authority issuing it, annexed to the information, and commands some proper officer to apprehend the person complained of, and bring him before proper authority, to be dealt with according to law. If the warrant be issued upon a *qui tam* prosecution, the complainant must enter into a sufficient recognizance for due prosecution. If the person accused cannot be apprehended by the officer, there is an end of the prosecution; for we have no process by which to pursue him to outlawry, as in England, and by which he incurs the forfeiture of his goods and chattels. Neither does a criminal who flies from justice, immediately on the commission of a crime, forfeit all his

goods and chattles, as in England. Neither his person or estate, can be affected by any decision of a court, until he is arrested.

An arrest is the apprehending or restraining the person of another, to have him forthcoming to answer for some crime : and for every act, which by law is denominated a crime, every person is liable to be arrested. An arrest may be made in four ways. 1. By Warrant. 2. By an Officer without Warrant. 3. By a private Person without Warrant. 4. By an Hue and Cry.

1. An arrest by warrant, is made by a sheriff, constable, or some person specially authorised, by virtue of a warrant issued by an assistant, justice of the peace, or the clerks of courts, who are the only officers under whose hands they can be issued. No warrant can be issued by any of those officers, unless a previous complaint, or information has been exhibited, by some proper informing officer, or some private person in those cases admitted by law, excepting in the instances of profane swearing, drunkenness, and sabbath-breaking, in which cases they are authorised by the statute law, and by the common law where persons commit riots, or break the peace in their presence. By the English law, justices of the peace have power to issue warrants without complaint, to arrest persons accused or suspected of crimes ; this is necessary there, because they have no informing officers possessing the same power as our grandjurors, to make presentment at all times ; and therefore, if justices of the peace had not this authority, all criminals would have the best opportunities to make their escape. But our practice is much preferable. It seems improper that the same person should act in the character of an informing officer, and of a judge, and that he should have the power whenever he thought proper, to issue his warrant to apprehend any person. By rendering it necessary, that he should have a previous complaint, from some informing officer, before he grants a warrant, there is a constant check to restrain any abuse of authority : and as the informing officer can only present the offence, he has not sufficient power to tempt him to abuse it.

The power of officers, who have lawful warrants directed to them, has been in a great measure delineated. It may be here generally remarked, that an officer is justified in every act that

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he does by force of a warrant apparently legal ; for no officer is bound to know the niceties and subtilties of the law : But where a warrant is void on the face of it, or it appears that the authority signing it, has no jurisdiction, then the officer is not warranted to execute it. Every officer has power to call upon all persons to assist him in apprehending a criminal. In all cases where warrants are issued upon complaint for a crime, the officer has power to break open doors if necessary, for the purpose of arresting the criminal : but he is bound in the first place to signify the cause of his coming, and to request admittance, and if that is refused he is justified in breaking open doors.

A general warrant to apprehend all suspected persons, without naming or describing any particular person is illegal and void, for the uncertainty of it : for every warrant ought to name the person to be apprehended, and not to leave any discretionary or general power of arresting persons not named, to the officer. Search warrants are frequently granted by assistants and justices of the peace, where a person makes complaint of the loss of goods, that he suspects some particular person has stolen them, and that they are concealed in a certain place. Upon this, such authority may grant a warrant, to break open if need be, and search all suspected places and houses, but which must be named and described : and to apprehend such suspected persons, as are named and described, if the goods are found with them ; but a general warrant to search all suspected places and houses, and to apprehend all suspected persons, without any particular description, is illegal and void, and every act done by an officer by force of it, is a trespass.

2. Arrests by officers without warrant, may in certain cases be justified by statute. <sup>i</sup> Assistants and justices of the peace, having plain view and personal knowledge, that a person is unnecessarily travelling on the Sabbath, may with or without a written warrant cause him to be apprehended and brought before him, and held for trial. So may a sheriff, constable, grandjuror, and tythingman, without warrant apprehend such traveller, and carry him before the next assistant or justice of the peace : and all persons commanded are obliged to assist. <sup>k</sup> When rioters, in the case of riot,

refuse

<sup>i</sup> Statutes,      <sup>k</sup> Ibid.

refuse to depart, it is in the power of any assistant, justice of the peace, sheriff, selectman or constable, to cause such rioters to be apprehended and to command necessary assistance for that purpose, and to hold them, (or where it is necessary) to carry them before an assistant or justice of the peace, who may bind them to keep the peace, or may commit them, or recognize them for trial, to some proper court, or if they have jurisdiction, punish them as the nature of the case may require.

1 By the common law, a justice of the peace may apprehend by himself, or cause to be apprehended by word only, any person committing a felony, or breach of the peace in his presence. So may a sheriff and constable, and carry the offender before a justice of the peace. In cases of capital and high crimes, or dangerous wound, they may on probable suspicion, arrest the criminal, and if necessary, break open doors, or even kill him, if he cannot otherwise be taken : and if he or his assistants, be killed, in attempting such arrest, it is murder in all concerned in the opposition.

3. \* Arrests by private persons, are to be made when they are present at the commission of any capital crime, or any high crime, such as robbery, burglary, manslaughter, horse stealing, and the like. They may justify breaking open doors, in the pursuit of such criminal, and if they kill him, provided he cannot be otherwise taken, it is justifiable, and if he kills them, it is murder. If a private person is present at the commission of such crimes, and the offender escapes through his negligence, he is liable to be punished by fine and imprisonment. Upon probable suspicion, a private person may arrest a criminal, but cannot justify breaking open doors to do it, and if either party kill the other, it is manslaughter, and not murder : because there is no malicious design to kill. In the case of advertisements offering rewards to apprehend persons, who have been guilty of robbery, burglary, theft, or any high crimes, there is no authority in the advertisement to justify a private person to apprehend such criminal : but he must do it solely by force of the right to apprehend upon probable suspicion.

4. \* Hue and Cry, is the process of pursuing offenders for capital and high crimes, by raising all the people in the neighbourhood

1 Hal. P. C. 86.  
4 Black. Com. 293.

4 Black. Com. 292-  
\* Statutes, 22.

\* 2 Hawk. P. C. 74.

hood, and following on foot and by horse, as occasion shall require. This is a most excellent process to pursue offenders, and prevent their escape. The constables of the several towns, are directed to raise hue and cries, and their refusal, subjects them to the penalty of forty shillings, to the use of the town, and all private persons who refuse to assist, incur the same penalty. Hue and cry, may be raised by order of an assistant, or justice of the peace, upon receiving information, that some crime has been committed, and that this is necessary to apprehend the criminal. In like manner, all private persons may apply to proper authority for this purpose, who may issue warrants, and the constables are bound to pursue them. In the first case, such warrants are to be pursued at the expense of the state, and in the latter, at the expense of the party praying them out. All constables are authorized to put forth pursuits, or hue and cries, after murderers, peace breakers, thieves, robbers, burglarians, and other capital offenders, where no magistrate or justice of the peace is near at hand.

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#### CHAPTER TWENTY-FIRST.

#### OF COMMITMENT AND BAIL.

**W**HEN a criminal is arrested, and brought before an assistant or justice of the peace, if the crime with which he is charged, be cognizable by them, they proceed to trial and judgment: and for that purpose may hold the prisoner in custody, and adjourn from time to time, as the nature of the case may require, and may take bail, or commit him, as may be necessary. If the person be convicted, he may appeal to the next county court, upon procuring proper surety, that he will prosecute his appeal and abide final judgment. The right of appeal however, is taken away in the cases of drunkenness, profane swearing, and sabbath breaking, and for offences against the laws for restraining unlicensed houses, and selling lottery tickets, granted by another state. But if the crimes be not determinable by single ministers of justice, then it is their duty to proceed to an enquiry and examination of the facts charged against the person apprehended, and if on enquiry, it shall be found

found that there is probable cause to suspect, that he is guilty of the crime laid to his charge, such court shall recognize with sufficient surety such person, if the offence be bailable, to appear before the next court, that has jurisdiction of the offence, and for want of sufficient bail, to commit him to goal for the purpose aforesaid. But if the offence be of such a nature, as not to be bailable by law, then such offender must be committed to goal, to remain there till the session of the court that has power to try him.

In the enquiry to be made by single ministers of justice, respecting crimes, of which they have not ultimate jurisdiction, they have no power to examine the person accused, respecting the facts charged against him, (tho justices of the peace have sometimes done it through ignorance,) for we have not by statute introduced the practice of contravening the general maxim of the common law, that no one is bound to betray himself, and for that purpose, subjected the person accused to a personal examination, by which he may be entangled and perhaps convicted. Such examination is authorized in England by statute. But here the only enquiry which such single minister of justice can make, must be of the proper and legal witnesses, and the accused has an opportunity of obviating their testimony, by adducing witnesses on his part: and then upon such hearing, the authority has only power to decide whether there be that degree of proof, that probable suspicion and presumption of the guilt of the offender, that he ought to be subjected to a trial before a court, having competent and conclusive jurisdiction. They ought in such cases, to be equally cautious not to exercise their power of deciding on the prosecution, as tho they had full and final cognizance: and not to recognize persons to higher courts, upon slight presumptions and remote probabilities of guilt. Single ministers of justice, may in some measure be compared to grandjuries at common law, in handing forward prosecutions. Single grandjurors must rest for their knowledge upon partial information, as they hold no regular enquiry. When a person is apprehended in consequence of a complaint made in this manner, it is reasonable that some enquiry should be made, before he should be holden to bail, or committed to goal, for the purpose of  
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being subjected to final trial. As this enquiry is made by assistants and justices of the peace, for this purpose, it is proper that they should adopt the same principles of judging, when they recognize a person to appear before a court of competent jurisdiction, as grandjurors when they find bills of indictment.

When a warrant is issued by the clerk of a court, by order of the court, upon the information of the attorney for the state, or presentment of some grandjuror, exhibited to them in session, and the offender is brought before the court, he has the same privilege of bail, as in other cases.

In respect of bail, our law determines that no man's person shall be restrained, or imprisoned by any authority whatever, before the law has sentenced him thereto, if he can or will give sufficient security, bail, or mainprize, for his appearance and good behaviour in the mean time, unless it be for capital crimes, contempts in open court, or in such cases where some express law allows or orders it. The consequence of this law is, that all offences are bailable, which are not capital. By express statute, the court having final jurisdiction, may bail in cases of treason. This law does not extend to cases where imprisonment is inflicted, as a punishment on the conviction of a crime. Courts ought not to require excessive and unreasonable bail, but to proportion it according to the nature and aggravation of the offence. When a person fails to appear before court, or abide final judgment according to the tenor of his recognizance, it is forfeited, and on a suit commenced thereon, the courts have a discretionary power to chancer the bond to such sum as they judge reasonable; according to the circumstances of the case.

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## CHAPTER TWENTY-SECOND.

### OF ARRAIGNMENT.

**A**RRIGNMENT is the calling the prisoner to the bar of the court, to answer the matter charged in the indictment or information. Arraignment is not necessary in all criminal prosecutions, where



where the punishment is such that it cannot be inflicted unless the prisoner be present, as in all capital cases, or where corporal punishment must be inflicted, the prisoner must appear at the bar of the court, and plead and be arraigned in person : but where the crime admits of no corporal punishment, and nothing but a fine or pecuniary forfeiture is incurred, then he may appear and plead by attorney.

A person indicted or informed against, being in custody of the court, or being bailed and appearing for trial, upon motion of the attorney for the state, or without, if they think proper, the court direct the sheriff to set him at the bar. The sheriff then puts the prisoner at the bar of the court, and by the humanity of our practice without shackles or irons. The chief justice then, before the prisoner is called upon to plead, asks the prisoner if he desires counsel, which if requested, is always granted, as a matter of course. On his naming counsel, the court will appoint or assign them. If from any cause, the prisoner decline to request or name counsel, and a trial is had, especially in the case of minors, the court will assign proper counsel. When counsel are assigned, the court will enquire of them, whether they have advised with the prisoner, so that he is ready to plead, and if not, will allow them proper time for that purpose. But it is usually the case that the prisoner has previously employed and consulted counsel, and of course is prepared to plead.

The prisoner is called upon by the clerk of the court by name, to hold up his hand : but this is not absolutely necessary, for any act by which he acknowledges himself to be the person, will be sufficient, but if he should by any act, wilfully refuse to acknowledge himself to be the person, the court may proceed on the arraignment. The clerk of the court reads to him the indictment or information, and then addresses him in these words. "*To this indictment, or information, what is your plea, guilty, or not guilty.*" On this, the prisoner if he wishes to have a fair trial, may plead several pleas, which will be considered in the next chapter ; or he may confess the truth of the whole indictment or information by pleading guilty, which saves a trial, and the court have nothing to do

do but to render judgment according to law, or he may stand mute and refuse to plead. A prisoner is said to stand mute, when being arraigned, he refuses to make any answer, or makes answers foreign to the purpose, and not allowable, and will not answer otherwise, or having pleaded not guilty, refuses to put himself on the country for trial. If he says nothing, the court are officially bound to empanel a jury, to enquire whether he stands obstinately mute, or whether he be really dumb. If the latter is the case, the trial may be, as if he had pleaded not guilty, but whether on such a conviction, the person could be executed is undetermined. By the common law, if a person is obstinately mute, in case of treason, or petty larceny, or misdemeanors, it is in judgment of law, equivalent to conviction; but for other crimes, as murder, robbery, and the like, if he obstinately stood mute, he was subjected to the dreadful sentence of penance, to be pressed and starved to death. In this state, if a prisoner should wilfully and obstinately stand mute, it would be deemed equivalent to the plea of not guilty, and the court would accordingly proceed to trial.

By the common law, an accessory cannot be arraigned, till the principal is convicted: for it is an absurdity to try a person as accessory to a crime, when it never has been proved that the crime was committed: and the principal may afterwards upon trial prove his innocence. In theft it is provided by statute, that the concealer of the fact, and the receiver of stolen goods, knowing them to be such, may be proceeded against as principal, tho the principal has not been tried.

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## CHAPTER TWENTY-THIRD.

### OF PLEADINGS.

**W**HEN the prisoner is arraigned, and asked, what is his plea he has the privilege of five different pleas. 1. To the Jurisdiction. 2. In Abatement. 3. Demurrer. 4. In Bar—and 5. General Issue of not guilty.

1. A plea to the jurisdiction may be given, where a person is

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prosecuted

• 2 Hawk. P. C. 227. 4 Black. Com. 324.

prosecuted before some court, that has not cognizance of the offence : as the indictment of a person before a court of common pleas for murder. The statute law has defined, and limited the jurisdiction of every court, and if a person is called upon to answer before a court that has not legal power to try him, he may take an exception to the jurisdiction, without answering to the offence.

2. A plea in abatement is principally offered for misnomer, or calling the prisoner by a wrong name, or misdescribing him. But this answers him little purpose, for in his plea he must give his true name, and description, and an information may be made conformable to it, or a new indictment presented. So far, as certain defects in the information or process, which would be abateable in civil suits, a plea in abatement might be offered.

3. Demurrer, as in civil cases, is an acknowledgment of the truth of the facts charged in the indictment or information : but then the prisoner insists that they do not amount to the crime alleged, or that some material requisite in the indictment is omitted. We have already pointed out the requisites to constitute good indictments and informations, and when they are defective in any such respects, advantage may be taken of it on demurrer. If the technical words are omitted, as *tratoriously*, in an indictment for treason, murdered with malice aforethought, in an indictment for murder, and the like, or if from the facts stated, it appears that they do not amount to the crime charged, as an information for stealing a dog, it will be ill on demurrer. In cases of demurrer, where the offence is not capital, if the point be judged against the prisoner, he shall have judgment rendered against him without further trial. But in capital cases, tho the point be judged against him, he shall have liberty of trial by jury. Demurrers in criminal prosecutions are rarely given, as the person may generally take the same advantage on the general issue, or under a motion in arrest.

4. *p* Pleas in bar, go to the merit of the prosecution, and give a reason why the prisoner ought not to answer, or put himself on trial for the crime alleged. A person may plead in bar to a prosecution, a former acquittal, and also a former conviction : but it must be on a prosecution for the identical act and crime. For  
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The maxim of the common law is, that no man is to be brought in jeopardy of his life, security, liberty or property, more than once for the same crime. Therefore when a person has once been acquitted, he may plead such acquittal in bar, to a prosecution for the same crime. On the same principle, if a person has once been convicted of a crime, he may plead it in bar to a prosecution for the same offence, for no man shall be punished twice for the same crime.

A person may plead in bar to a prosecution, the statute of limitations. *9* No person shall be indicted, prosecuted, informed against, complained of, or compelled to answer before any court, assistant or justice of the peace, for the breach of any penal law, or for other crime or misdemeanour, by reason whereof any forfeiture belongs to any public treasury, unless the indictment, presentment, information, or complaint, be exhibited within one year after the offence is committed. And every indictment, information, presentment, and complaint not exhibited within the time limited, shall be void and of no effect: provided that this act shall not extend to any capital offence, nor to any crime that may concern loss of member or banishment, or any treachery against this state, nor to any pilfering or theft, the value whereof is above ten shillings, nor shall it affect the private rights of individuals. This law extends to offences at common law, as well as those created by statute.

If the special matter pleaded in bar of the prosecution, be found against the prisoner, he may in capital cases further plead the general issue of not guilty, for on that plea only can a man be subjected to judgment of death.

5. *r* The general issue of not guilty, is the proper plea when the person wishes to have a trial upon the prosecution. When he makes the answer of "not guilty," at the time he is put to plead, the issue is closed without making any answer on the part of the state. This is the only proper plea where the facts are contested, for a person indicted or informed against, cannot plead any special matter by way of justification. As on an indictment for murder, a man cannot plead that it was in his own defence, against

*9* Statutes, 127.

*r* 4 Black. Com. 348.

against a robber on the highway, or a burglarian ; but he must plead generally not guilty, and give the special matter in evidence : for such a special plea not only amounts to the general issue, but as in all criminal prosecutions the facts are charged to be done with a criminal intent, which is the gist of the information, the whole ought to be directly negated : for tho it appears on the trial, that the facts were done, yet if it appears, that they were not done with a criminal intent, the person cannot be found guilty. There can therefore, never be a propriety in confessing the facts, and then justifying, because the mere proof of the fact, without shewing the criminal intent, cannot be sufficient to convict a person. The consequence is, that in every criminal prosecution, the prisoner has the same privilege of contesting the criminality of the intent, as the truth of the facts on the general issue, which therefore can only be the proper plea.

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#### CHAPTER TWENTY-FOUR.

##### OF TRIAL.

**W**HEN the prisoner has pleaded not guilty, the clerk of the court will ask him. By whom he will be tried ? In cases not capital the proper answer is, " By my country,"—but in cases capital, the answer is, " By God and my country." The putting the question to the prisoner to decide by whom he will be tried, seems to imply, that he has an option. This was introduced into England at a time when there were various methods of trial, and the prisoner had actually a choice. The practice has been continued here, tho a person has no such choice : for the only legal method by which the person accused can be tried, is by the jury. *f* The statute law says, that every person prosecuted for any delinquency before the superior or county courts, shall have liberty of trial by jury, if desired, but has provided no other mode if desired, nor is any other mode known to the common law. When therefore a person accused of a crime, wishes to try the question of fact, he must desire a jury : for the court cannot be judges of facts, unless expressly authorised by some statute, as they are in civil cases.

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Our courts however seem to have adopted the principle, that they have the power to try a criminal, if they please on his request, and have proceeded to try them for offences not capital.

By the usual mode of trial upon the plea of not guilty, is by jury ; which we are to consider in this chapter, and which would furnish all the necessary information, in case the issue should be tried by the court.

Before every court, the jury which is returned for civil, is returned for criminal causes. When the cause is ordered for trial, the jury appear, consisting of twelve returned as aforesaid, or if the number be deficient, they are to be supplied as in civil cases ; the prisoner is placed at the bar of the court, and then an opportunity is given him to make his challenges. Challenges are of two kinds ; challenges for cause, and peremptory challenges.

1. , Challenges for cause, are for the same reasons in criminal, as in civil causes, they are for some defect, as want of estate, age, or freedom : for some crime, as where a person has been convicted of some crime for which he has received an infamous punishment, or for some relation to the persons concerned or interested : or for some bias, prejudice, or partiality. These challenges are equally allowed to the state and the prisoner in all cases capital or not capital. ,

2. Peremptory challenges are without shewing any cause, and are admitted only in capital cases. By the common law, the prisoner might challenge peremptorily, thirty five jurors, — \* but the statute law has limited the number to twenty. This privilege manifests great tenderness and humanity to the prisoner : for there are numerous instances, where jurors will be returned to try a prisoner, against whom he has no legal challenge, and yet there are stronger reasons why he should decline being tried by him, than in those instances where the law allows him to challenge. It may sometimes happen that a challenge for cause may be made, and over ruled, which will naturally give the juror such a prejudice, that the prisoner would be unwilling to trust his fate in his hands. Indeed it is apparent that there will be a thousand causes existing, for

prisoner is acquitted, for any misconduct of the jury, a verdict may be set aside and a new trial ordered.

When the motion in arrest is adjudged insufficient, or the prisoner is convicted on his own confession of guilty, or when in cases not capital, on a demurrer is adjudged sufficient, then it remains for the court to render judgment against the criminal, that he should suffer the punishment annexed to the crime by law. In treating of punishments, we have invariably mentioned the punishments. These are the punishments of the common law. Whenever a statute creates a crime, it annexes some specific punishment. The punishments at common law are fine, imprisonment and pillory.

No judgment, not even death itself, ever works a forfeiture of the blood of the criminal, except in cases of capital crimes where the criminal is subjected to a forfeiture of his estate, and is considered to be the punishment, not a consequence of the judgment. In England, the punishment of death, by rendering judgment of death against a criminal, amounts to a forfeiture of estate, and corruption of blood: so that no person can inherit from him, or trace his line of consanguinity through him.

But with us, when a person is condemned to death, his estate is not forfeited, and his property is not confiscated. If he shall make a will, it will be valid for the disposition of his estate, if he should die intestate, it would descend to his heirs.

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## CHAPTER TWENTY-SIXTH.

### OF WRITS OF ERROR, REPRIEVE, AND PARDON.

**W**RITS of Error in all criminal cases, will lie from the inferior jurisdictions to the superior court, and from the superior court to the supreme court of errors, for all errors apparent on the record. If the court render an erroneous judgment

*Statutes 3.*

for which a prisoner would object against a juror, which do not come within the general principles of challenges for cause : and for which it would be impracticable to make legal provision. For the purpose then of giving a person the fairest trial, he is indulged with the privilege of challenging twenty jurors, without assigning any reason, which will give him an opportunity of rejecting all those against whom he has conceived any prejudice, from their appearance, conduct, or character. \* When by reason of challenges with, or without cause, the number of jurors returned as aforesaid, is not sufficient to make up a panel, the court order the sheriff, or if he is interested, concerned, or related to the party, then the constable or such other officer as they shall appoint, to return a sufficient number of the bystanders, (*de talibus circumstantibus*,) and for want of such, any good and lawful freeholders of the county.

When there are twelve jurors returned, against whom the prisoner has no exception, or where he has challenged twenty peremptorily, and there are twelve returned, against whom he has no challenge for cause, then the panel is complete, and the jury may be said to be empannelled : for if the prisoner should persist in challenging more than twenty, peremptorily, the court would disregard such challenge, and order the trial to proceed. When the jury are empannelled, they are sworn, well and truly to try, and true deliverance make, between the State of Connecticut, and the prisoner at the bar, without respect of persons, or fear of man, according to law and evidence.

The attorney for the state then proceeds to lay before the jury, all the evidence against the prisoner, without any remarks or arguments. The prisoner by himself or counsel, is then allowed to produce witnesses to counteract and obviate the testimony against him ; and to exculpate himself with the same freedom as in civil cases. We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the

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\* Statutes 109.



the practice : for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defence. This doctrine might with propriety have been advanced, at the time when by the common law of England, no witnesses could be adduced on the part of the prisoner, to manifest his innocence for he could then make no preparation for his defence. One cannot read without horror and astonishment, the abominable maxims of law, which deprive persons accused, and on trial for crimes, of the assistance of counsel, except as to points of law, and the advantage of witnesses to exculpate themselves from the charge. It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adapted to convict him, and every privilege denied him, to prove his innocence. In England, however, as the law now stands, prisoners are allowed the full advantage of witnesses, but excepting in a few cases, the common law is enforced, in denying them counsel, except as to points of law.

Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to any thing but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered.

The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence, that they have abolished all those odious laws, and every person when he is accused of a crime, is entitled to every possible privilege in making his defence, and manifesting his innocence, by the instrumentality of counsel, and the testimony of witnesses.

Evidence in criminal cases is regulated by nearly the same principles as in civil cases. There are few leading points in which there is a difference, which it will be proper to consider in this place. In all capital cases, the law requires two or three witnesses, or that which is equivalent. The statute says, that no person

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for any fact committed, shall be put to death, but by the testimony of two or three witnesses, or that which is equivalent. In all prosecutions for perjury, it is necessary that there should be two witnesses, as the oath of the offender, is equivalent to the oath of one witness, it is therefore requisite that there should be another witness to turn the scale. In all other offences, not capital, the oath of one credible witness, is sufficient evidence to justify a conviction.

Where the fact to be proved respects the hand writing of the prisoner, the testimony of witnesses well acquainted with it, that they believe the paper in question to have been written by him, is evidence to be left to a jury. The confession of the prisoner out of court may be proved, and is sufficient evidence to convict him, without other proof, even in capital crimes, but his whole confession or story must be taken together. When a prisoner discloses any facts to the attorney for the state, on an application to be admitted a witness for the state, it shall be considered as confidential, and such attorney shall not be allowed to give it in evidence on trial; for this would tend to defeat the benefit the public might derive from such disclosures: but confidential communications to any other persons, may be given in evidence. No prisoner can be allowed by our law to become an approver; but the attorney for the state has a discretionary power, where there are sundry offenders, and other proof cannot be had, to take any of them for witnesses against the rest, and excuse such witness from a prosecution, for the offence. An accomplice in a crime, may be a legal witness, for the state and the party. But where sundry are joined in the same prosecution for the same offence, they cannot testify for each other: But if there be no proof against some of them, they may be admitted to testify for the rest.

It is a general rule, that no proof can be admitted respecting any fact not charged in the indictment or information, but that proof may be admitted with respect to circumstances that lead to the crime, and that where several facts are charged, which constitute the crime, the proof of any one of them is sufficient to convict the prisoner.

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Violent presumptions, in some cases are taken for full proof, as where a man is stabbed in an house, and another runs out with a bloody knife in his hand, and no other person is in the house, at the same time : but all presumptive evidence should be admitted with great caution : for the candour and benignity of the law, has laid it down as a maxim, that it is better to adopt such general principles respecting presumptions, that ten guilty persons should escape, than one innocent person be convicted. Two rules are therefore laid down by judge Hale, whose humanity rendered him the greatest ornament of the judicial character. Never to convict a person for stealing the goods of a man unknown, because he will not tell how he come by them, unless an actual stealing be proved : and never to convict a person of murder or manslaughter, unless the body be found dead ; on account of two instances, he mentions, where persons were executed for the murder of others, when they were living, but missing.

When the exhibition of evidence is closed, the attorney for the state opens the argument, the counsel for the prisoner follow, the attorney for the state then closes the argument, and the chief justice then sums up the evidence in his charge delivered to the jury, in which he states in the most candid and impartial manner, the evidence and the law, and the arguments of the counsel for the state, as well as the prisoner. The counsel for the state, should manage every criminal prosecution with the utmost coolness and fairness. He should display no marks of zeal or passion. He should not attempt to warm the feelings or prejudice the minds of the jury, by any pathetic descriptions, or artful misrepresentations. He should address himself to the understanding of the triers, and by a fair investigation of facts, and an ingenious discussion of points of law, open the way to the discovery of truth and justice. Such a line of conduct would reflect the highest honour on the candour and sensibility of a public officer. But when we see the prosecution of a criminal managed with a passionate vehemence, and the argument a compound of pompous declamation, and affected pathos, we detect the prosecutor as a blood thirsty savage, and unfeeling monster. Tho every reasonable indulgence is to be granted to a prisoner to prevent a conviction, yet attempts to excite the com-

passion of a jury, ought not to be encouraged. It is by the exercise of our intellectual faculties, in examining and comparing ideas, that we are to discover the truth of facts, and discern the principles of justice. When our feelings are tremblingly alive to the distresses of our fellow men, or our indignation roused to the highest pitch, against the crime of which a person is accused, the mind cannot be in a proper state to form an accurate decision. The ardor of sensibility, and the zeal of indignation, may prompt us to correspondent actions, but cannot commonly direct us in a right manner to the formation of an opinion : for our opinions are to be formed on ideas, communicated to the mind, and not on passions enkindled in the heart. Every juror ought therefore to banish every emotion from his breast, and be under the sole guidance of pure intellect, while he is hearing and deliberating on the evidence, and forming his judgment, this will place him in a proper situation to examine and compare the evidence, and decide where the truth lies : but if his indignation is highly enflamed against the prisoner, "Trifles light as air, will be to him confirmation strong, as proof of holy writ," and a conviction may be founded on slight presumption and circumstances of very remote probability. So where the compassion of a jury is highly excited in favour of a prisoner, he will overlook the strongest proof, his feelings will run away with his judgment, and a false pity and humanity, will induce him to bring in a verdict of acquittal, against the clearest evidence.

It is pleasing to remark, that these doctrines are now generally recognized in our courts : and that every where as sound sense and solid reason prevail, courts of justice have rejected the solemn declamations, the pompous descriptions, and the high wrought pathos of the ancient orators of Greece and Rome : and if Demosthenes, and Cicero, were now on earth, I doubt whether there is a judicial tribunal, that would approve and relish their sublime apostrophes to the heroes of Marathon, and the hills and groves of Albanum, tho embellished with all those graces of elocution, and that blaze of eloquence, which rendered those orators, the admiration of their own times, and have transmitted their fame to all succeeding ages.

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When the cause is committed to the jury, they cannot be discharged, till all have agreed in a verdict. A verdict may be either general or special. A general verdict, is finding the prisoner guilty or not guilty. A special verdict is where they have a doubt about the law, and chuse to leave it to the determination of the court : they therefore find all the facts specially, and submit the point of law to the court, but they have full power to determine the law, as well as the facts, and to find a general verdict.

When the jury have agreed upon a verdict, they return into court, the prisoner is placed at the bar, and the verdict is publicly delivered in open court. If the verdict is " guilty ", he is then said to be convicted of the crime whereof he stands indicted or informed against, and the court are to pronounce the judgment of the law. If the verdict is " not guilty, " then he stands acquitted, and can never afterwards be tried for the same offence, which may be done only in a *qui tam* prosecution, unless the verdict be set aside. But even in cases of acquittal, the statute law has vested the court with discretionary power of subjecting the prisoner to the payment of cost. \* It is enacted that in all criminal prosecutions, if the court before whom the trial is had, are of opinion, that tho the prisoner is found not guilty, yet the prosecution was occasioned by some unlawful or blameable conduct on his part, he shall not be discharged till he satisfies the cost : but where the grandjury find a bill to them presented, not true, and in every other case, where it shall appear to the court, that the indictment, or information was occasioned by mistake, without any fault on the part of the person accused, he shall then be dismissed without cost : and the cost shall be paid out of that treasury, into which the fine would have gone, had the criminal been fined on such prosecution.— When any person subjected to a fine is unable to pay, he may be assigned in service to any citizen of the United States, so long as shall be necessary : but when such cost cannot be recovered from such person, it shall be paid out of the state treasury, when the trial was before the superior or county court, and out of the town treasury, where, if it was before an assistant or justice of the peace. Where any expense is incurred in prosecuting a person, who can-

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\* Statutes, 40.

## 424 OF MOTIONS IN ARREST AND JUDGMENT.

not be apprehended or escapes without fault of the officer, before he is committed or jailed, it shall be paid out of the state treasury, if the crime was cognizable by the superior or county court.

The practice has been for all cost incurred in a prosecution before the superior court to be immediately paid by order of the court out of the state treasury, whether the offender was convicted or acquitted, and sentenced to pay cost or not. The cost in the county court was paid out of the county treasury till a late statute authorized them to draw on the state treasury for all costs in criminal prosecutions, and directed all costs that should be recovered to be paid into the same treasury.

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### CHAPTER TWENTY-FIFTH.

## OF MOTIONS IN ARREST AND JUDGMENT.

**A**FTER verdict and before rendering judgment, motions in arrest or stay of judgment may be offered. These are for any defects in the indictment or information, as for the want of any sufficient certainty, setting forth and describing the person, the time, the place or the offence; as where in an information for stealing, the fact was laid to be done in another state, and no averment that it was committed in, or the goods stolen brought into this state, on motion in arrest, after a verdict of guilty, the information was adjudged to be bad. In the course of these enquiries, we have had occasion to point out the requisites to constitute an information or indictment: it will not be necessary to enumerate them again: it is sufficient to observe that where the indictment is not conformable to these requisites, advantage may be taken of it under a motion in arrest: for such defects are never aided by verdict, as in civil cases. So on the trial, if there is any irregularity in the conduct of the jury, advantage may be taken of it in this manner. If the judgment is arrested, it sets aside the whole proceedings; but it is no bar to another prosecution, for the same offence, and the person may be indicted and informed against a second time.

The attorney for the state, may move in arrest, (when the pri-

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soner is acquitted) for any misconduct of the jury, for which the verdict may be set aside and a new trial ordered.

When the motion in arrest is adjudged insufficient, or none is offered, or the prisoner is convicted on his own confession, or plea of guilty, or when in cases not capital, on a demurrer, the information is adjudged sufficient, then it remains for the court to render judgment against the criminal, that he should suffer the punishment annexed to the crime by law. In treating of crimes we have invariably mentioned the punishments. These are by statute or the common law. Whenever a statute creates a crime, it inflicts some specific punishment. The punishments at common law are fine, imprisonment and pillory.

No judgment, not even death itself, ever works a forfeiture of the estate and corruption of the blood of the criminal, excepting manslaughter, which operates a forfeiture of his goods. For those crimes where the criminal is subjected to a forfeiture of estate, it is a specific sum, and is considered to be the punishment itself, and not a consequence of the judgment. In England, the consequences of rendering judgment of death against a criminal, are the forfeiture of estate, and corruption of blood : so that no person can inherit from him, or trace his line of consanguinity thro him.

But with us, when a person is condemned to death, the charge of prosecution, imprisonment and execution being paid, the residue of his estate, shall be disposed of according to law. If the criminal shall make a will, it will be valid for the disposition of his estate ; if he should die intestate, it would descend to his heirs at law.

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## CHAPTER TWENTY-SIXTH.

### OF WRITS OF ERROR, REPRIEVE, AND PARDON.

**W**RITS of Error in all criminal cases, will lie from inferior jurisdictions to the superior court, and from the superior court to the supreme court of errors, for all errors apparent on the face of the record. If the court render an erroneous judgment upon a plea  
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<sup>21</sup>  
a Statutes 3.

in abatement, upon a demurrer or motion in arrest, or if after conviction they render judgment, that the prisoner shall suffer a punishment, not warranted by law, writ of error lies for the redress of such grievance ; but if the error be not apparent on the record, no writ of this kind can be sustained. It is unnecessary to detail the particular errors for which this writ will lie. We have pointed out the requisites in criminal proceedings, by which every matter of error can be easily ascertained. The form of proceeding is in the nature of a petition to the court, having cognizance, in which the petitioner states the case, and assigns the errors as in civil cases.

§ The governor, the lieutenant governor, or any three of the assistants concurring, may reprieve a condemned malefactor, to the next general assembly : but the exercise of this power is usually unnecessary, because the superior court delay the day of the execution, till after the commencement of the next session of assembly, to give the malefactor an opportunity to petition for pardon.

The power of granting pardon to criminals sentenced to death, or to any other punishment, is vested by law in the legislature. Perhaps there is a propriety in vesting this power some where, for it must be acknowledged that there are some instances, where a person may be legally convicted, and yet there may be such extenuating circumstances in his favour, as to justify the humane interposition of government in remitting the punishment. But this benevolent prerogative ought to be exercised with the utmost caution and prudence. The probability of obtaining pardon after conviction, will encourage the hardened and daring villain, to the commission of crimes, by encreasing the calculable chances to escape punishment. It is impossible to establish any general rules, to govern and direct the discretionary power of granting pardons : and such favours will often be granted to the most atrocious offenders, by the whim and caprice of the moment, or the sudden overflowings of an ill timed, or misplaced humanity, without calculating the mischievous consequences, that will result from the example : let the person accused have every possible advantage to make his defence on trial ; let no person be convicted without the clearest proof : but when a criminal is convicted, let the idea of punishment



punishment be certain and inevitable : let the hope of pardon be excluded, and the door of mercy be closed upon him. For tho it appears to be a benevolent act to save a wretched being, from that painful and dreadful punishment, to which he had subjected himself by his crimes, yet the interest of society and the cause of humanity require that he should undergo the punishment, as a public example, and that he should not be allowed the benefit of a pardon, which would defeat the end and design of human punishments, and probably expose the innocent members of the community to much greater calamity than the pain of the punishment, to be inflicted on a man, whose crimes had drawn down on his head the vengeance of the law.†

But there is no duty more incumbent on the legislature, than to shut their ears against all applications for liberation of criminals, sentenced to imprisonment in Newgate. The great excellency of that mode of punishment is, that from its mildness, every person may be assured of the certainty of carrying into execution, the punishment denounced by law. But if the idea be admitted, that criminals may be discharged by the legislature, before the period for which they were sentenced expires, so frequent will be the applications, and so numerous the impositions, that the terror of the punishment will be destroyed, by the hope and prospect of a speedy liberation.

\* There are two causes, for which execution must be respited or delayed, not for the purpose of giving the malefactor an opportunity of applying for pardon, but from very humane principles. The first is where a woman sentenced to death, pleads pregnancy. In such case, the court must respite the execution till she be delivered. When this plea is made, the court must direct a jury of twelve

matrons

† This doctrine is illustrated by a recent instance in Naples. The present king, tho despotic, is humane. The frequent pardon of criminals, render the crimes of murder and assassination frequent. The pretor or principal officer of the city, upon the king's refusing to sign a warrant for the execution of a murderer, resigned his office. Struck with his firmness, the king signed the warrant, the murderer was executed, and the officer reinstated. By the rigor of this officer, in the execution of the law, murders which had become very frequent, by the indulgence of the king, in pardoning, were in a great measure prevented.

Ramble thro France, Holland and Italy, Lit. 19  
 c. 1 Mal. P. C. 369.

matrons or discreet women, to enquire into the fact, and if they find her quick with child, for barely with child, unless it be affirmed in the womb, is not sufficient: execution shall be stayed generally till the next session, and so till she is delivered, or proves by the course of nature not to have been with child. But if she has once been respited and delivered, and afterwards becomes pregnant, she shall not be respited again, for she may be executed before the child is quick in the womb: and she shall not avoid the execution of the law, by her want of chastity.

Another cause for respiting execution is, where the prisoner becomes non compos, between the judgment, and the awarding of execution. It is a general principle, that where a person commits a capital crime in his right mind, and becomes non compos before he is indicted, he shall not be tried: if before conviction, he shall not be convicted; if after conviction, he shall not receive judgment: if after judgment he shall not be ordered for execution: for it is a maxim, that a madman, is sufficiently punished by his own madness; and the humanity and charity of the law, presume that in all these stages, if he had the exercise of his reason, he would shew some cause, why the proceedings against him should be stayed. The court ought therefore to respite his execution, till his senses are restored, and then he will be liable to suffer the punishment pronounced by law.

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## CHAPTER TWENTY-SEVENTH.

### OF EXECUTION.

WE are now to close our enquiries respecting the dreary subject of crimes, by the execution of the judgment of the law, the inflicting of the punishment. This in all cases capital, or not, must be performed by the proper officer, the sheriff, his deputy, or a constable, by a warrant from the court, signed by the clerk, designating the nature and extent of the punishment. It will be unnecessary to describe the manner of inflicting punishment for offences not capital, as it is universally known: but there may be a propriety in adding a few words respecting the executing of the punishment

ment of death, to which the word execution, is commonly appropriated.

The only method of inflicting the punishment of death, is by hanging. The sheriff receives a warrant from the court, directing him to cause execution to be done on a certain day, and between certain hours of the day. The place of execution is left to the discretion of the sheriff, who causes a gallows to be erected at some convenient place, and at the time appointed causes the malefactor, to be drawn in a cart to the gallows, and there to be suspended by the neck, till he is dead. When dead, the body may be delivered to the friends, to be buried by them if any offer themselves, otherwise it is usual to bury it under the gallows. If the criminal should be taken down before thoroughly dead, and he should revive, or if he should by any means be restored to life, the sheriff must hang him again; for the first hanging was no execution of the sentence, and justice shall not be eluded by any accident or collusion.

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4 2 Hawk. P. C. 462.

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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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BOOK SIXTH.

## Of the Principles of Equity.

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CHAPTER FIRST.

### HISTORY OF THE ORIGIN AND PROGRESS OF COURTS OF EQUITY.

WE have now fully handled the various subjects that are governed by the precise principles of law. It remains to close our enquiries by unfolding and explaining the principles of equity, which have been adopted to supply the imperfections, and remedy the inconveniencies of general laws. We are to enter upon a field of disquisition, which has never been fully explored, and we are to simplify and systematize a subject, about the first principles of which the most eminent writers disagree, and which has hitherto been treated in a desultory manner, without any proper method, or arrangement.

In tracing the origin of our proceedings in equity, as well as law, we must recur to the country from whence our ancestors emigrated. In contemplating the juridical history of that country, we cannot but observe the gradual progressive improvement of their government, of their code of laws, and of their mode of administering justice. When our ancestors left England, the general principles of the common law were pretty well settled and illustrated. The several kinds of actions were thoroughly understood, and the rules of pleading were accurately known. They had therefore an opportunity

opportunity of commencing their judicial system, under circumstances of peculiar advantage. They had no occasion to wait for the lapse of centuries, that experience and accident might furnish them with the best adapted modes of relief. They imported from their parent country the most excellent parts of their jurisprudence, and supplied the deficiency by regulations of their own, equally excellent.

As our common law is chiefly derived from the common law of England, I have considered it as sufficient to refer to the English authorities, without attempting a juridical history of its several branches. An enquiry of this kind, would be useless as it respects practitioners, and readers in general; and those who have a taste for such researches, may find sufficient means to indulge their curiosity, in the writings of the English jurists. But the system of equity is so singular in its nature, and the history of it is so necessary to develope, and comprehend its first principles, that I have thought proper to deviate from my general plan, and trace its origin in the concise manner.

A court of equity, distinct from a court of law, is peculiar to the English jurisprudence. In the Roman government, the pretor who was the judge, not only proceeded according to established, and known rules, but he exercised a discretionary power, in determining according to the principles of right: but these powers were blended in the same tribunal, without admitting the idea of a distinct court of equity, whose decisions were to be governed by a system of rules, peculiar to itself. In England, the introduction of a court of equity in chancery, was not owing to any deliberate plan of the king, or the legislature, upon the calculation of its probable utility: but is merely the offspring of a fortuitous concurrence of circumstances. <sup>a</sup> William the conqueror established a supreme court, which was held in his presence in his palace, and called the court of the king. In this court was vested all judicial power, and they granted relief, not only in those cases, for which provision was made by express law; but upon all applications that were grounded upon the principles of justice. So that in the earliest period of the English government, there existed a tribunal which

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<sup>a</sup> 1 Reeve, Hist. Eng. Law. 48.

claimed an equitable jurisdiction. This court was composed of **barrons**, and the great officers of the realm. In the absence of the **king**, an officer, called the chief justiciary, presided, who had great and extensive authority. Of this court the chancellor was a member, an office derived from the ecclesiastical tribunals, and which they had borrowed from the Imperial law. <sup>b</sup> Originally this officer was the chief notary or scribe to the Roman Emperors, but was afterwards vested with judicial authority of considerable extent. On the establishment of the christian hierarchy, the bishops forgetting the lowliness of the founder of their religion, and aping imperial grandeur, appointed chancellors, who were the principal judges in their consistories. When the Roman empire was subverted, and the modern kingdoms of Europe were established on its ruins, almost every state retained the office of chancellor, with different power and dignity, according to their different constitutions. In England the chancellor was a confidential servant of the crown; he was chaplain and secretary to the king; the keeper of his seal; and it was his duty to supervise and seal the king's charters, and public instruments. In the court of the king, it was his duty to make out the writs, by which the parties were called before the court. At the same time, there was another court called the exchequer, in which the same persons were the judges, as in the court of the king.

<sup>c</sup> But the multiplicity of business which came before the court of the king, rendered an alteration of the institution necessary, and for the accommodation of the people, and to extend the influence of the crown, we find in the reigns immediately subsequent to the conquest, an important change took place: the court of the king seems gradually to have disappeared, and out of it to have arisen the courts of king's bench, common pleas, exchequer, and chancery. The extensive power of the grand justiciary becoming dangerous to the crown, the office was abolished soon after the conquest. But as I am tracing only the history of equity, I shall confine my remarks to the court of chancery, which was the court which assumed an equitable jurisdiction.

<sup>d</sup> On the division of the jurisdiction of the court of the king, into the

<sup>b</sup> Encyclopedia, Art. Chancellor.  
<sup>d</sup> Ibid. 61.

<sup>c</sup> 1 Reeve, Hist. Eng. Law. 38, 59.

the different tribunals, which I have mentioned, the chancery retained the power of making writs : and was considered to be the *officina justitiæ*, the manufactory of justice, where original writs were framed, and sealed, and where suitors were obliged to resort to purchase them, in order to commence actions, and obtain legal redress : for which purpose the chancery was open all the year, and writs issued at all times. The chancellor had the power to frame writs, applicable to the case of every complainant, and so conceived as to furnish the specific redress he wanted. When this had been long practised, such a variety of forms were introduced, that cases could rarely arise, which had not some form applicable to it, and of course there was but little judgment to be exercised : the old forms were therefore adhered to, and became precedents of established authority in the chancellor's office. The making of writs becoming a matter of course, and the business of the chancery increasing, it was at length confided to the chancellor's clerks, who strictly observing the old forms, they became in process of time, so sacred, that an alteration of them was deemed an alteration of the law : so that when a new case arose, the suitor was obliged to apply to the parliament for a writ, to obtain redress ; for the chancellor having discontinued the practice of framing new writs, the power was supposed not to exist. In consequence of the frequency of the petitions to parliament, it became necessary to enlarge the power of the clerks, or as they were called, the masters in chancery. The statute of Westminster the second, enabled them to frame writs in similar cases, so that there should be no defect of justice : which it is said, gave the handle to the court, to assume, and establish their jurisdiction in matters of equity.

For the purpose of fully explaining this subject, it is necessary to consider the judicature of the parliament, and the king's council. The parliament in its earliest period, acted not merely as a legislative body : but assumed extensive jurisdiction, as a judiciary tribunal. It was considered as possessing an absolute supreme power in all respects, and it was therefore natural to suppose that it had a right to redress every possible injury that a man could sustain. The supremacy of the legislature, was considered as el-

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evaluating that tribunal, superior to the common technical notions of general laws and precise rules, and that abstract rights and perfect equity, were to be the broad basis of its determinations. This opened the door for innumerable petitions, of every nature, and the multiplicity of the business rendered it impossible to transact it, with dispatch. It became therefore necessary for the parliament, to appoint a number of their own members, to examine the petitions, and point out the tribunals to which they ought to be referred for relief; and in those instances where the parliament only had competent power, they sustained the application. A jurisdiction in criminal cases was likewise assumed, and offenders were tried by jury before the parliament. This representation clearly shews the confusion of jurisdiction, between the legislature and courts of law, during those periods.

While the parliament exceeded the limits of a legislature, we find that similar jurisdiction was exercised in the council of the king. When the ordinary courts of law, had no power to grant relief, the council, consisting of the king and the nobles, supplied the defect, and for that purpose, claimed all the discretionary power of a court of equity. *f* But when the common law had become settled, and had arrived to that degree of perfection, that the ordinary courts could grant relief in all cases where it was proper, the people became sensible of the inconvenience of such a jurisdiction, as was claimed by the council; and the parliament passed sundry acts to limit and restrain their proceedings. But when this purpose was accomplished, it was soon discovered, that there was no tribunal to exercise this equitable power. For the courts of law having adopted certain precise rules, they continued to be governed by technical principles, and narrow views, which prevented them from enlarging their power, and jurisdiction to every species of relief, which justice required, and which had been granted by the council. From this illiberal conduct of the courts of law, resulted the necessity of an equitable tribunal, to succeed the council in the administration of justice. It would have been consonant to reason, for the legislature to have provided a remedy by delegating the necessary power to some proper court: but the legislature

*f* 2 Reeve, Hist. Eng. Law. 418.



ture instead of interfering, suffered the business to take its own course: and a court by mere accident, grew out of the necessity of things, and by degrees affirmed and established a jurisdiction of great extent and importance.

g The only court at this period which had any power, that bore a resemblance to an equitable jurisdiction, was the court of chancery. The chancellor was one of the principal counsellors to the king, and in virtue of his office, determined on the validity of the royal grants, exercised a guardianship over the persons and estates of idiots and lunatics, and framed original writs, adopted to every case, by which alone, justice could be obtained. This was a kind of judicature, different from that of any other court, and seems naturally to have pointed out the court of chancery for a proper tribunal, to exercise an equitable power in granting relief. This idea was probably confirmed by the permission given to the chancellor, by the statute of Westminster the second, to frame writs in all similar cases, which had enlarged to so great an extent his remedial authority, that every sort of relief seemed within his jurisdiction. When it was discovered that in many instances, courts of law could grant no relief, or that their judgments were hard and unjust, he seems almost imperceptibly and by general consent, to have sustained the applications of suitors of this description and to have succeeded the council in this branch of jurisdiction. For when he had gone as far as the analogy of the common law would allow, in framing writs of a liberal conception, he might think it inconsistent with his office, to send any one from chancery, without relief of some kind, and he might venture in his own court, to entertain and decide such matters of an equitable nature, as he foresaw it would be in vain to send to the courts of law. When the chancellors had assumed this jurisdiction, they adopted a process by subpoena, to compel the appearance of the parties in court, and took effectual measures to execute their decrees. In this manner, without any authority from the legislature, a tribunal acquired a judicial power of great consequence.

h It was in the reign of Richard, II. that the court of equity in chancery seems first to have been known, as distinct from a court of law.

g & Reeve, *Hist. Eng. Law.* 190.      h *Ibid.* 188.

**law.** It is evident, that it grew out of the defects of the remedies furnished by the courts of common law. These were guided in their proceedings, and decisions by settled forms, which were supposed to grant relief in every instance, that was proper for the cognizance of the law : and when a principle, or rule had once been established by the decision of a court, it was considered as an authority, from which they could not deviate. It is evident that in this early period, when mankind had such obscure ideas respecting legislation and jurisprudence, it was impossible that courts under such restrictions could do compleat and substantial justice : there would be many instances to which the common law could not reach, or which instead of relieving, an adherence to the common law would only confirm and aggravate the injury. It became expedient and necessary to correct such a defective state of judicial polity, by the establishment of a power which should mitigate the rigor and supply the defects of the common law, without subverting or contravening its general principles. From this state of things originated the court of equity, and had courts of law in early times extended relief, and enlarged their jurisdiction according to the progressive improvements of society, with the liberal spirit and comprehensive views of Lord Mansfield, the existence of a court of equity, as a distinct tribunal had never been necessary.

The legislature made sundry efforts to check the growth of this new court : but tho at first, its jurisdiction was narrow, and its power feeble, yet it gradually assumed jurisdiction and acquired power, till it became the most respectable judicature in the kingdom. The first considerable branch of business undertaken by the court of chancery in its new capacity, was that of uses and trusts : and this has therefore, by some been considered as the commencement of their power. Uses and trusts, were introduced by the clergy to elude the statutes of Mortmain. The courts of law refused to give them their sanction, and as the chancellor was always a clergyman, the ecclesiastical order made application to that court, and obtained decrees that in a feoffee possession of land, should account for the profits to him for whose use he held it, according to the dictates of conscience. This species of conveyance soon afterwards became very general, for the purpose of avoiding the forfeiture

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of estates in the time of the wars, between the two races, in consequence of which, the chancery obtained a very extensive jurisdiction over landed property, which has continued to the present time.

Notwithstanding the rapid increase of the power of courts of equity, the courts of law refused to lessen it by extending legal remedies, and by their obstinate adherence to rule, and precedent, rendered necessary the growing power of the chancery. On all bonds with penalties which were originally introduced to save interest, the courts of law rendered judgment for the whole penalty, without paying any regard to the sum justly due. To remedy this injustice, equity interposed, and decreed the payment of the principal sum and interest. This was a vast accession of jurisdiction to the chancery. Courts of law had no power to compel the disclosure of fact, by the oath of the parties, or the producing of books and papers. Chancery by assuming this power, claimed cognizance of all matters of account; which drew before its tribunal an infinite number of cases. Before courts of law, witnesses must be introduced in person, but in chancery, a commission issues, and depositions are taken. When therefore it was impracticable to obtain a witness by reason of infirmity, or absence beyond sea, it became necessary to apply to the court of chancery.

I shall not undertake to point out all the instances in which courts of chancery can interpose, and grant relief in England. It is sufficient to remark, that it has directly or indirectly claimed cognizance of almost every matter that respects property, so as to become the most important tribunal in England. In a vast variety of subjects, they have by a long train of decisions introduced and established general rules and principles. They have given the authority of precedents to their decisions, and adhere to them with as much scrupulosity, as courts of law do to prior determinations. By this method, the proceedings in equity are reduced to much the same regularity and certainty, as at law: and in reading the reports of their determinations, we appear to be before a court, who are governed by rule and precedent. From this historical deduction, it is apparent, that equity has only taken that ground  
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which law refused to occupy : and that when a jurisdiction has been assumed over any branch of human concerns, it has been systematized upon the broad basis of general considerations in the same manner, as courts of law proceeded with the various subjects of their jurisdiction. Courts of law, by adopting narrow views, and illiberal maxims at an early period, became stationary, and refused to grant relief in all the cases which justice required. On this basis, equity erected its superstructure, systematized every branch of cases, as fast as they came under its cognizance, and at the same time continued to exercise the great leading principle of abating the rigor and supplying the defects of law, the perpetual operation of which extended the power of the chancery, and furnished a system of relief, commensurate with the wants of mankind.— From these observations, it is evident that courts of law might have assumed, and that the legislature might now transfer to them, the whole business of courts of equity, and that there is no necessity for two distinct tribunals, to administer justice between man and man.

Having traced the origin of equity in England, I proceed to consider its introduction and progress in this country. Our progenitors borrowed the idea of a court of equity, from the land of their nativity. In the infancy of the government, the general assembly, like the parliament and council in England, assumed the jurisdiction of all matters in equity, and continued till lately, to be the only court of chancery in the state. The mode of proceeding was by a memorial or petition, stating the ground of the application, and notice was given to the opposite party. While such was the power exercised by the legislature, they discovered the necessity and propriety of delegating from time to time portions of their equitable jurisdiction, to the courts of law, where it was apparent, that it might be vested with great propriety, and exercised with great advantage to the community : while they found it to be extremely burdensome and inconvenient to themselves. This circumstance opened the door to a considerable improvement in jurisprudence.

The legislature vested the courts of law, with the power of rendering judgment on penal bonds, for the sum justly due : they admitted

mitted the parties to testify in their own cases, in actions of book debt : and they authorised the taking of depositions in all civil cases. These amendments or alterations of the common law, cut off a vast branch of the jurisdiction of courts of equity. It rendered unnecessary an application to equity for relief against penalties, and the whole business of account, with all their incidents, could be settled at law. A convenient mode of obtaining the testimony of witnesses, when too infirm, or remote to attend in person was introduced, and as uses and trusts, were never introduced, equity had but little concern with real property. These improvements were introduced by statute, and the courts of law acting upon enlarged views and liberal principles, in granting relief, the business of a court of equity was reduced to a much narrower compass here, than in England.

But the business of this kind encreasing with the population of the country, the legislature thought it proper and convenient, to delegate the principal part of their equitable jurisdiction to a different tribunal, instead of erecting a court for this purpose, and vesting it with all the powers of a court of equity, in imitation of the court of chancery in England, they supposed it to be more proper to annex to the powers of the legal tribunals then in being, the powers of a court of equity. If the good of the community required the perpetuation of the distinction, between law and equity, they ought to be administered by distinct tribunals : but as this distinction in many instances is merely verbal, and in all, the jurisdiction might be blended, it is strictly proper, that these different powers should be vested in the same tribunal, for the purpose of forming a coalition.

The legislature by statute, disburdened itself of the principal part of its equitable power, and as the law now stands, the superior court has jurisdiction of all matters exceeding one hundred pounds and not exceeding sixteen hundred ; and the county courts in all matters, not exceeding one hundred pounds, the legislature having reserved all matters exceeding sixteen hundred pounds. No appeal lies, but writs of error will lie as at law.

## CHAPTER SECOND.

## OF THE DISTINCTION BETWEEN LAW AND EQUITY.

**T**HE idea of a distinction between law and equity, which have the same object in view, to dispense justice, seems at first singular and inexplicable. We should think, that having but one object, their powers would be blended, and that their principles would be precisely the same. But we find that there are courts of justice in being, which have the same objects of jurisdiction on different principles, and which not only furnish different modes of relief in the same case, but one has the power to counteract the proceedings and vacate the judgments of the other. To explain the difference between law and equity in order to obtain clear and accurate ideas respecting equity, will be the subject of this chapter.

Two jurists of great eminence, have published very different sentiments on this subject. Lord Kaimes, in his principles of equity lays it down as a general maxim, that the province of a court of equity, is to abate the rigor, and supply the defects of the law. Sir William Blackstone, in his commentaries on the laws of England, controverts this doctrine, and endeavours to prove that law and equity, are essentially founded on the same principles, and that the difference between them, results from the mode of trial, the mode of proof, and the mode of relief.

The idea of Lord Kaimes, is the same as that of Lord Bacon, and which seems generally to have been entertained respecting that court: but is not perfectly correct and just. To assert that courts of equity have the power to abate the rigor and supply the defects of law, in general terms, is not strictly true, and Blackstone, by a number of instances which he has adduced, has clearly proved the contrary. There are many instances in which the judgment of a court of law, may bear hard upon the party and yet no relief can be obtained. There are some cases where a statute of limitation may bar a just demand, under such circumstances as appear very inequitable, yet a court of equity cannot furnish relief. It is however equally evident that there are cases where courts of equity can correct the injustice, and relieve against the judgments of law as well as furnish remedies, which are beyond the reach of the law.

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To assert as judge Blackstone has done, that equity differs from law only, in respect of the mode of trial, proof and relief, will be found variant from the truth. It is true that they materially differ in the points which he enumerates, but it is equally true that they differ in many other respects. The whole of the jurisdiction of the court of equity was acquired by the assumption of the principle, of deciding according to conscience in the administration of justice, where the courts of law furnished no redress, or their judgments were hard and oppressive, and it is on this broad basis, that the court of equity now rests its authority. In England, courts of law will render judgment on a bond for the whole penalty, without regarding the sum due in justice : But a court of equity from a regard to justice, will decree the payment of the principal and interest only. Where a contract has been executed in legal form, a court of law must on a breach of it render judgment for the damages : but a court of equity tho the contract be binding at law, will not decree a specific performance of it, if it be unreasonable and obtained by fraud, or taking an unfair advantage of the party. There is a substantial difference in principle, between courts of law and equity. Courts of law have adhered to positive rule, tho the consequence was, that in particular cases, their judgments contravened the principle of justice ; courts of equity have disregarded positive rules for the purpose of attaining complete justice.

It is evident, that Blackstone, to avoid the absurdity of the common distinction between law and equity, has given a description of the court of equity, which is more favourable to the position he was labouring to support, than to the truth. It is manifest, if we give to this court that latitude of discretion, which Lord Kaimes has done, that it would be able to set aside the law, and throw every thing afloat. As the writings of these eminent authors, are calculated to lead us into mistakes respecting a subject of great importance, it is necessary that we should guard against it, by obtaining precise ideas respecting the distinction between law and equity, and accurate definitions of the jurisdictions of courts.— Perhaps the following illustration of the power of a court of equity, will be found to correspond with the truth.

A court of equity, acting according to the dictates of conscience, and aiming at the attainment of abstract right, and perfect justice, has power to abate the rigor, correct the injustice and supply the deficiency of positive law, where such rigor, injustice, or deficiency result as an indirect and collateral consequence, and operation of law ; and where it is apparent, that such effect was not the design and intent of the law ; but if the legislator had foreseen it, he would have made provision for relief. But where the matter complained of, flows as a direct and necessary consequence from the principle of law, adapted upon a calculation to promote the general good, a court of equity has no power to interpose. This limitation is a proper restraint upon the boundless discretion given to that court, by the general terms used by Lord Kaims, and at the same time gives them an equitable power, which is denied by Blackstone.

In the foregoing chapter, I have had occasion to illustrate this principle, by shewing that courts of equity originated from the impolitic conduct of courts of law in denying relief, in cases where justice required. This was not a necessary and natural consequence of civil institutions, as some have suggested ; but was owing to an accidental and uncommon combination of events ; for such a tribunal has never existed in any country, but England. In the Roman law, which has been celebrated for its wisdom and justice, no such tribunal was known : but the pretor, in the administration of law, exercised in substance, the power assumed by the court of chancery in England. This demonstrates the practicability of blending legal and equitable powers, and of administering justice on the broadest basis by one tribunal.

As equity is only an improvement, or extension of the principles of law, it is necessary that we obtain a thorough knowledge of law to comprehend the ground of equity.

In the earliest periods of society, we find, that effectual provision is made to guard and protect the rights, that respect the persons of the citizens : of course equity has never any occasion to interpose  
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*l* Jus prætorium est quod prætores introduxerunt, adjuvandi vel supplendi, vel corrigendi, juris civis gratia, propter utilitatem, publicans.

*l* 7. § 1. de justitia et jura



in regard to these : but as the rights of property, are of a more complicated nature, and varying in importance, according to the progress of society, we find they require a longer period before the regulations respecting them can be matured to perfection. This has rendered them the proper object of equitable administration, and of course property is the only subject of equitable jurisdiction.

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### CHAPTER THIRD.

#### OF THE GENERAL PRINCIPLES OF EQUITY.

**I**N handling this subject, we must consider not only the principles, which have been systematized by practice ; but the nature of that power by which equity may extend further relief, and provide new remedies.

Courts of equity when they have assumed any branch of jurisdiction, have by a series of decisions, adopted and established consistent and uniform rules, and in due time have proceeded with the same precision and certainty as at law. In these cases we have no occasion to recur to original principles. It is sufficient to class, arrange, and systematize the business in such a manner, as to unfold it in a clear point of light : and it is upon this branch of the subject, that our future enquires are chiefly to be employed. In this state, the jurisdiction of courts of equity, over a variety of subjects, is as well known, and as definite as that of law. But still we must keep in view, the original principle that gave birth to this jurisdiction : for from the nature of equity, there must be a power perpetually existing, and capable at all times to be called into exercise, and to furnish whenever new cases arise a remedy on the broad basis of abstract right. The possible extent of this power can never be known and calculated. It may be supposed to be employed on new subjects, enlarging the equitable jurisdiction, and exhibiting the exercise of a power that furnishes relief correspondent to the growing necessities and progressive improvements of mankind.—Whenever this power, has by its operation, established remedies for every possible injury that a man can sustain, and for every case in which the public authority ought to interpose, then the reason

for

for exercising this discretionary jurisdiction will cease, the whole power of a court of equity, may be transferred to the courts of law, and there will be one uniform system of jurisprudence, which will extend to every case, and may be administered by one tribunal. How soon, or whether this period can ever arrive, is a subject of speculation too refined for this time. It will be sufficient to consider the present state of things, and leave the possible improvement to future ages.

In this chapter I am to contemplate very concisely the general principles which have been adopted in raising the present fabric of equitable tribunals, and which may still be exercised in finishing and ornamenting that noble superstructure, with every possible perfection. To comprehend in a scientific manner the scope of law and equity, the student ought to have a thorough knowledge of the principles of human nature. The investigation of that subject belongs to a very different work from the present. It will be sufficient to make a few remarks upon the moral character of man. Nothing exhibits a more glorious subject of contemplation than man, when we take into view his intellectual, active, and moral powers. Endowed with a moral sense, he is capable of distinguishing between right and wrong, good and bad, virtue and vice, and to ascertain the moral quality of every action. The distinction of right and wrong, is grounded on utility. The ultimate object of human pursuit, is human happiness. Those actions which promote it are good, those which contravene it, are bad. But when we are treating of equity, it may be observed, that the rights of property only, come under consideration, and that we need not trace moral principles to their fullest extent.

The moral sense, conscience, or the approbation or disapprobation of one's conduct, which is common to the human race, is the criterion to determine what is right and what is wrong. This announces to every human being, that an act which injures another in his property, is wrong; however, it may be cloaked with legal forms, or coloured by a deceitful appearance: and that a just compensation for the injury, ought to be made to the party who sustains it. This is the standard of human conduct, and must be the pole-star to guide courts of equity.

The leading maxims of equity as well as law are, that wherever there is a right, some court must be empowered to make it effectual, and that for every wrong there is a remedy. When the rules of law will not support a right, or redress a wrong, then equity may interpose. The subject is to be contemplated on the scale of perfect justice. The moral sense must be the rule of judging. But still it must be remembered, that in forming the decision, regard must be had to the collective system of equity, that prior decisions, if any, must be attended to, and that the fundamental principles of law, grounded on political calculations of general good, must not be contravened.

Another rule of high consequence is, that where a man by art, fraud, or circumvention, obtains a legal advantage of another, or has so shielded himself by the forms of law, as to take an unfair and unjust advantage of another, equity may grant relief. It is manifest, that there will be many instances, where a person will bring himself within the letter and description of the law, expressly for the purpose of taking an undue advantage of another. Here the design of the law is not only eluded, but prostituted to the purposes of injustice. Many instances of this kind may be found where relief has been granted.

He that wants equity, must do equity, is an important rule of justice. No man shall have the aid of a court of equity, tho he has a colourable claim, unless he comes forward with pure and honest intentions. It will therefore always be deemed a good defence, to shew that in the very case which the petitioner has brought, he denies the justice which he demands. So the defendant may rebut the equity of the demand, by shewing that the claim ought not to be substantiated. If a person prays for the specific performance of a contract, the defendant may avoid it by proving it was obtained by fraud, imposition, or mistake.

Another leading principle is, that no man is entitled to the aid of a court of equity, where that aid becomes necessary by his own fault. Thus where a man nullified his security for money loaned, by erasing the word interest, to elude taxation, and then inserted it again, he cannot be relieved in equity, on account of  
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the wrongful act done by himself, tho the justice of the debt remains unimpeached, as it respects the debtor, because he had no intention to injure him. Allied to this are the rules, that no man shall take advantage of his own fraud or wrong, and that no man shall make a defence against justice, more than a claim.

Where two persons stand in the same equity, he who has the legal right shall prevail.

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#### CHAPTER FOURTH.

#### OF MORTGAGES.

**I**N the prosecution of these enquiries, I shall first consider the power of courts of equity in respect of real property ; then of personal property ; and last the mode of trial. The most important branch of equity jurisdiction, as relative to real estate, is with respect to mortgages. To discuss this subject with perspicuity and accuracy, I shall consider,

1. The Definition of an Estate in Mortgage.
2. How a Mortgage is considered in Equity.
3. Of the Interest of the Mortgagee and Mortgagor, in the Premises.
4. Of the Equity of Redemption.
5. Of Priority of Incumbrances, and tacking prior and latter Securities together.
6. Of Mortgages as relative to Husband and Wife.
7. Of the Funds to pay Mortgages.
8. Of the Payment of Interest on Money lent on Mortgages.
9. Of the Method of accounting.
10. Of Foreclosure.
1. The Definition of a Mortgage.

A mortgage is, where a man for a specific sum of money borrowed of, or for a debt due to another, grants him an estate in lands, as a security for the repayment, on condition that if the mortgagor repay the sum lent, or discharge the debt, at the time mentioned

mentioned in the mortgage, then the conveyance to be void, and the mortgagor to have right to re-enter. The land is considered as a pledge for the payment of the money, and the estate is conditional, defeasible on the payment of the debt. The usual practice is to annex the condition to the deed, specifying the sum due, and the time within which it is to be paid. but a bond, or any separate written agreement, containing the conditions, will constitute a mortgage: but the agreement must be in writing, or it will be void by force of the statute of frauds and perjuries. It is a very common practice for the creditor to take a bond or note for the debt, and also security by mortgage, conditioned to be void on payment of the bond or note: in which case the mortgage is considered as collateral security for the debt. / In England, it is the usual practice to grant long terms of years by way of mortgage, with condition to be void on the repayment of the mortgage money: and also a covenant, that the mortgagor and his heirs, will on default of payment, convey the freehold of the mortgaged lands: but this mode has never been adopted in this state

## 2. How a Mortgage is considered in Equity.

“ In law, the mortgagee is considered as the proprietor of the premises, subject to be divested only by a strict performance of the condition: but in equity, the transaction is considered as a mere personal contract for the loan of money, and the land a security for the due payment thereof: and the mortgagor notwithstanding the solemnities of the conveyance, is looked upon as the actual owner of the land. The payment of the debt determines the interest of the mortgagee, but till that time he is entitled in equity to receive and enjoy the profits. “ Every contract for the loan of money, secured by the conveyance of real estate to the lender, and not made in contemplation of an eventual arrangement of property, is in equity deemed a mortgage: and all private agreements between the parties, to alter in any subsequent event, its original nature, or prevent the redemption of the estate pledged, upon payment of the money borrowed with interest, are void. For were such agreements suffered to prevail, it would put it in the power of every mortgagee to take advantage of the necessities of the mortgagor,

by

/ 1 Black. Com. 158. Bac. Abr. 643,    1 Vcz. 361. Pow. Mort. 14.  
 2 Atk. 495. Pow. Mort. 18.

by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity therefore, the right of redemption is considered as inseparably incident to a mortgage, and cannot be restrained: it being a maxim, that an estate by the same instrument of conveyance, cannot be a mortgage at one time and at another time cease to be so.

3. Of the Interest of the Mortgagee and Mortgagor, in the premises.

• The execution of the mortgage conveyance vest in the mortgagee, a legal title to the lands, and he may immediately enter thereon; subject however to be dispossessed, upon performance of the condition, by payment of the mortgaged money at the day limited. In England, the usual way is to agree, that the mortgagor shall hold the land till the day assigned for the payment, and that the mortgagee, shall not intermeddle with the possession till default of payment. In this state it is not usual to make such written agreement: but it is usually understood, that the mortgagor shall remain in possession of the premises, till the day assigned for the payment of the money, and it is the constant practice for the mortgagee, to permit the mortgagor to retain such possession: Where there is a written agreement to remain in possession, the mortgagor may be considered as tenant for years: if no written agreement, as tenant at will, with a legal right to become re-vested with the title of the lands, upon the payment of the mortgage money, within the time limited: but on failure, the estate becomes absolute in the mortgagee, and he may take possession thereof, without any possibility at law of being afterwards evicted, by the mortgagor. But the mortgagor then has the equity of redemption, by which, on payment of what is justly due, he may be let in by a court of chancery to redeem. The estate of the mortgagee is assignable, deviseable, descendible, and may be taken by the levy of an execution, as real estate. In which cases the assignee, devisee, heir, and creditor stand in the place of the mortgagee. If there be not sufficient personal estate to pay debts, it might be taken by the executor or administrator in the same manner as real estate.

party against whom he seeks to be relieved in equity. The same rule applies to an heir who resorts to equity to redeem. — So if a mortgage be of a lease for years, and afterwards more money be lent on a bond; if the executor would redeem he must pay both: for the equity of redemption is affixed in his hands. \* But if there be several incumbrances on an estate, and the prior incumbrancer claims a bond likewise, it will be postponed to all subsequent real incumbrances; for he shall not hold the estate for a debt not directly charged upon it, against incumbrancers, whose debts are actually charged upon it. \* If a man lends money on bond, and has a mortgage by assignment, he has the same equity against the mortgagor and his heirs, to have both debts paid. \* Where the person claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him, without discharging a bond debt; because the land in the hands of the alienee, can be charged nothing, but what is an immediate lien thereon, which the bond is not. y If the mortgagee or assignee, to whom money is due, countenance a fraud upon a third person by concealment thereof, he shall be redeemed upon the payment of the principal money only. So if the mortgagee says there is a less sum due, than actually is due, which induces a person to purchase or take another mortgage, the mortgagee shall be redeemed upon paying the sum declared to be due.

No time has been fixed by statute or by the decision of courts of equity, in this state, which shall be an absolute bar to a redemption of a mortgage. \* But the courts of chancery in England, have adopted this principle, that by reason of the great difficulty in making up accounts after a long period, some time ought to be established at which the right of redemption shall be presumed to be deserted by the mortgagor, unless he is capable of producing circumstances to account for his neglect: such as by imprisonment, infancy, in case of a woman coverture, or by having been beyond sea, and not by having absconded, which is an avoiding or retarding of justice. And to preserve an uniformity between proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean

\* 2 Vern. 245. f 2 Vern. 177. 2 Atk. 51. 3 Atk. 556. \* 2 Ch. Rep. 361. Pow. Mor. 146. \* Prec. Ch. 89. y Ibid. 131. \* Pow. Mor. 118.

mean time, has been fixed upon as the period beyond which a right of redemption shall not be favoured.

Our courts of equity have fixed on the time of fifteen years ; being the time in which the right of entry on lands is barred by statute : and it will be reasonable to allow the exceptions introduced by the English courts. These are when the mortgagor is under certain disabilities, as infancy, coverture, imprisonment, or beyond sea. *a* But if the time considered in equity as a presumptive bar, begins to run before the intervention of the legal disability in the person having right to redeem, it will not prevent the time going on against him. *b* An account settled between the mortgagor and mortgagee, within the time limited, will preserve the right of the mortgagor to redeem. *c* So will any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years ; as by devising the money in case the mortgage should be redeemed, or by exhibiting a bill to foreclose.

5. Of priority of incumbrances, and tacking prior and latter incumbrances together.

*d* It is a settled doctrine, that if there are several mortgages, or other incumbrances on the same estate, the first incumbrancer who has the legal estate, shall be preferred to the second, and so on, according to the periods, at which their respective incumbrances bear date : for it is a maxim of equity, as well as law, that he who is first in time, is the strongest in right. *e* But this rule must be understood with this restriction, that the first mortgagee be not guilty of any fraud or artifice, by concealing his mortgage, or otherwise to induce another person to give credit to or lend his money on such subsequent security, for if he is, the subsequent incumbrancer will gain a priority thereby. The equity of the latter mortgagee will be much stronger, if the first mortgagee is concerned in transacting the subsequent, and omit to inform him of the prior demand. *f* If the first mortgagee is a witness to the second mortgage deed, and knowing the contents, does not acquaint the second mortgagee with the former mortgage, this will give the latter a preference.

*g* But.

*a* Pow. Mort. 154. *b* Ibid. 155. *c* Ibid 158. *d* Brown. Par. Cas 66. *e* Atk. 49. *f* 1 Will. Rep. 393.



*g* But it must appear that he knew the contents: and his being a witness shall not be presumptive evidence of his knowledge; for a witness is only to authenticate the instrument and cannot be presumed privy to the contents. *h* But if any neglect can be imputed to a witness so circumstanced, it seems that would affect him, and give priority to a subsequent incumbrancer: for it is a principle of equity, that where of two persons, one of whom has been guilty of a neglect, and the other has not, there must be a sufferer, the loss shall fall on him, from whose omission the mischief rises.

*i* If a subsequent mortgagee apply to a prior incumbrancer, to know if he has any incumbrance or mortgage on the estate, upon which he intends to take a security, and he denies it, he will thereby lose his priority. But in this case, it will be necessary for such subsequent mortgagee or his agent, to inform the prior incumbrancer, that he is about to lend the mortgagor money, or otherwise he will not on denial lose his priority: for he is not bound to answer, unless he knows of such intentions, as the question may be put merely to satisfy an impertinent curiosity.

*k* It is a rule in equity, that where several persons have equal equity, he among them who has possession of the legal estate, may make all the advantages of it, that the law admits of, and thereby protect his title, tho it be subsequent in point of time: and his adversaries shall have no help in equity: for where equity is equal, the law shall prevail. Therefore if there are several mortgages, the last mortgagee having lent his money on valuable consideration and without notice, may by purchasing in the precedent incumbrance, which carries with it the legal estate, protect himself against any mortgage subsequent to the first, and prior to the last, for then he will have both law and equity on his side.

*l* A prior incumbrance satisfied at law, will protect a subsequent incumbrance in equity, altho nothing was paid for it, or if the consideration were by way of exchange, because the having of the deed, or an acquittance will be sufficient for that purpose. *m* A prior mortgage purchased in, will be no protection to a later mortgage unless it be forfeited, for until then the estate remains as it was at law, redeemable upon the performance of the condition stipulated.

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*g* 1 Vez. 6. Brown, Rep. Ch. 357. *h* 1 Vern. 146. *i* Pow. Mort. 189, *k* 1 Vez. 573. *l* 1 Eq. Cas. Abr. 323. *m* 2 Ven. 156.

▪ A later mortgagee who purchases in a prior security to protect his own, shall not only hold it until he be paid his debt, and reimbursed the money advanced by him, to purchase it, but until he has received all the money and arrears of interest due on the security brought in, as well as his own. • And as a later mortgagee may tack a prior incumbrance to his own, and thereby protect himself against intervening charges thereon, so a prior mortgagee, having the legal estate, may tack a subsequent sum advanced by him, on a former security to his prior mortgage, and thereby protect himself against intermediate incumbrances. ¶ So if there be first and second mortgagee, and the first lend money after the first mortgage was made, taking a judgment as a security, he may tack this to his mortgage, to protect himself against the second mortgagee: for he has the legal estate, and the judgment, tho it passes to a craft presently in the land, operates as a lien thereon. ¶ But if one who has a first mortgage, purchase in a subsequent judgment, without the consent of the mortgagor, a subsequent mortgagee, or assignee of the equity of redemption, will not be obliged to pay the money due on both securities, in order to redeem: for such transaction of the mortgagee tended only to load the estate, without the consent of the owner, when he had no prospect of bettering his security.

• If the first mortgagee has notice of the intervening incumbrance, at the time of his lending more money on a judgment, or otherwise, he will not be permitted to tack them together against a subsequent mortgagee: / and the law is the same in case of purchasing in prior securities, to protect subsequent incumbrances: it will not avail the purchaser, if he had notice of the intermediate incumbrance, at the time he advanced his money on such subsequent security: for it is the purchasing without notice, that gives him equal equity with the intermediate incumbrancer: and if a man will purchase with notice of another's right, his giving a valuable consideration will not avail him: for he throws away his money voluntarily, and of his own free will. ¶ But when the prior conveyance is defective, notice of the former will not defeat a subsequent mortgage.

## 6. OF

▪ 1 Vern. 45. • 3 Ch. Caf. 119. ¶ 2 Atk. 352. 2 Wil. 494. 2 Vez. 652.  
 ¶ 1 Eq. Caf. Abr. 226. • Pow. Mort. 230. / 3 Atk. 238. 2 Ch. Caf. 35.  
 3 Ibid. 119. ¶ 1 Eq. Caf. Abr. 320.

## 6. Of Mortgages as relative to Husband and Wife.

\* The wife of the mortgagor cannot have dower in an equity of redemption, in a mortgage in fee : \* nor can the wife of the mortgagee. y The husband, by virtue of his marriage obtains no other interest in his wife's estate of inheritance, than an estate of freehold for their joint lives, in case there be no issue of the marriage, and for his life as tenant by the curtesy if there be : of course he can not make a valid mortgage thereof, to be binding on her, and her heirs for any longer period. But the wife may join in a mortgage deed, which will be valid, in the same manner as an absolute alienation : and after the death of the husband, his estate shall be applied to pay off the mortgage, and the wife will be entitled to stand in the place of the mortgagee, and to be satisfied out of the estate of her husband. \* If a married woman be a mortgagee, her husband in virtue of the marriage, will be entitled to the mortgage, as a chose in action, and if it be reduced to possession in his life, it will go to his heirs, and not survive to his wife : but there must be an actual reducing it into possession, by procuring payment of the money : for no assignee can have a greater right than the husband had, which was to reduce it into possession in his life time, and if he neglects to do it, the assignee cannot, but it survives to his wife.

## 7. Of the Funds to pay Mortgages.

If the mortgagor dies and directs how his estate shall be applied to discharge a mortgage, his direction must be followed : but if he gives no direction, then the equity of redemption goes to his heirs or devisees, as the case may be, who must redeem with their own money, and cannot call for the application of personal estate for that purpose, as they can in England.

## 8. Of the payment of Interest, on Money lent on Mortgages.

In England, the statute of Anna, declares that all bonds and assurances for the payment of any principal money lent on usury, whereupon there shall be reserved or taken above five pounds in the hundred for a year, shall be utterly void. \* On this statute, it has been adjudged, that not only mortgages where more than five per cent

\* 2 Atk. 516. \* Hard. 466. Cro. Car. 190. y Co. Lit. 351. \* 2 Atk. 324. 2 Vern. 401. Pre. Ch. 118. \* 3 Atk. 154.

and carry interest, be valid : but where interest is actually due, the parties by agreement may make it principal.

¶ If the first mortgagee enter, and afterwards suffer the mortgagor to take the profits without requiring interest, the land in the hands of the second mortgagee, shall not be charged with any interest for that time : that is the interest of the first mortgagee shall not affect the lands, so as to keep out the second mortgagee, longer than he would have been kept out, had the interest been duly paid. ¶ A mortgagee refusing to receive his money on tendry after forfeiture, will lose his interest from the time of the tendry : but notice must have been given six calendar months before, and the tendry made on the day of the determination of that notice. \* The tendry must be made to the person of the mortgagee, and it is not sufficient to make it on the land, unless the place, as well as time of payment be appointed.

#### 9. Of the Method of accounting.

¶ The land upon mortgage being generally left in the management of the mortgagor, and the conveyance thereof rather looked upon as a collateral security, for the due payment of the money lent, and interest, than as an actual alienation, the mortgagee is considered as having no right to meddle with the rents and profits until after he has taken possession thereof. There is no instance of the mortgagor being obliged by the court to account to the mortgagee, for the rents and profits for any of the years back, during which he has been in possession : for if the interest be not paid, the mortgagee ought to take the legal remedy to get possession himself. • If the mortgagee enters upon and takes possession of the estate, he becomes in the nature of a bailiff, to the mortgagor, and will be subject to account for the profits. So if the mortgagee be put into immediate possession, and the profits of the estate, evidently exceed the amount of the interest, the mortgagor may exhibit his bill for an account. ¶ By the rules of equity in England, the mortgagee will not be allowed any thing for receiving the rents, and profits of the estate, but must account for the full amount. Where the yearly rents and profits greatly exceeded the interest  
of

1 Pre. Ch. 30. 11 Eq. Cas. Abr. 318. \* Co. Lit. 219. \* Ibid. 211.  
• 3 Atk. 224. 2 Ibid. 107. ¶ Ibid. 534.

of the money lent, rents are usually made, in making up the account, and applied to sink the principal. But as this is often attended with great hardship, respecting mortgages, especially when the sum is large, and the mortgagee is forced to enter upon the estate, and then can only satisfy his debts by parcels, and is bound to the mortgagee, subject to account without failure, the court will not on every small excess of interest, apply it to the principal. On an assignment of a mortgage, the assignee will stand in the place of the assignor, and must account for all the rents and profits received by him: for the assignor had no lien on the estate, only for the sum actually due, which is all that he transfers. The mortgagee will be allowed for expenses — necessary repairs and of his improvements, and for defending the estate against any claim.

#### 10. Of Foreclosure.

The same principle of justice, which grants relief to mortgagors, after the time of payment has elapsed, has enabled the mortgagees to compel them to perform their contracts by the repayment of the money borrowed with interest, or be forever foreclosed of their right of redemption: for it is necessary that the title to the land should be quieted and settled.

The mortgagee, his assignee, his heirs, or in case the estate is insolvent, or wanted to pay debts, his executor or administrator, may petition that the mortgagor, or whoever is entitled to the equity of redemption, may be compelled to redeem, by paying the principal sum due, together with the interest, or be forever foreclosed from all right of redemption. The courts of chancery on such application, will ascertain the sum due, and decree that the mortgagor shall pay such sum within a certain time, which is longer or shorter at the discretion of the court, according to the relative value of the mortgage money, to the mortgage premises, and in case of payment, the mortgagee will be decreed to reconvey under a certain penalty; but if the mortgagor fail to pay the money within the time limited, he is forever secluded and debarred from all right of redemption, by which the mortgage is foreclosed

closed. But where the value of the estate greatly exceeds the value of the mortgage money, our courts of equity have refused to foreclose, and have dismissed applications for that purpose.

*f* Courts of equity will never decree a foreclosure, until the period limited for the payment of the money be passed, and the estate in consequence thereof forfeited to the mortgagee: for it cannot shorten the time given by express covenant, and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby. On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal measures, to establish it. A married woman having a right to redeem, may be absolutely foreclosed, by a proceeding against her during coverture. \* On application to a court by the mortgagee, an infant will be foreclosed: but then on his arrival to full age, a time will be allowed to shew good cause to the contrary. This is the English practice, and conformable to this is the rule, that the parol shall demur: that is, when a suit is brought against an infant, respecting his inheritance, where the decision would be a perpetual bar, the court may order such suit to remain over until he arrive to full age: \* but in this state, it has been provided by statute, that when any minor shall be interested in any mortgaged estate, or other real estate, which ought in equity to be conveyed to any other person, and such conveyance is decreed and ordered by the court having cognizance, the guardian of such minor is authorised and empowered to make and execute such conveyance in behalf of the minor, which shall be effectual: and the court have power to enjoin the guardian to make the same under a suitable penalty: and in case the minor has no guardian, the court may appoint one, who is impowered to defend him in the suit, and execute the decree of the court.

When there are sundry parties interested in a mortgage, all ought to be called before the court, on an application to redeem or foreclose; if they are not, none will be affected by the decree, but those who were parties to the suit.

The

*f* 1 Vent. 365. 1 Vern. 232. 13 Will. Rep. 352. \* 2 Vent. 351.  
 \* Statutes 48.



## OF MORTGAGES.

The mortgagor, or the person who represents him, and has the equity of redemption, may petition the mortgagee, that upon paying the principal sum with interest, within such reasonable time as the court shall fix, the mortgagee shall be compelled to reconvey under suitable penalty : and that on failure of paying the money by the time limited, the mortgagor shall be forever foreclosed of his right to redeem. When there are sundry incumbrances, the latter incumbrancer should make all prior incumbrancers parties to the suit.

\* When a person takes a mortgage as a collateral security for a bond or note, he may to enforce the payment of his debt, pursue all his remedies at once : he may bring an action on the bond or note, he may bring distress for the land, and may petition to foreclose the right to redeem, at the same time, and one suit is no bar to the other. Satisfaction for the debt is the object, and it is the duty of the debtor to make it, and on his failure, all the modes which he has given to enforce it, may be legally pursued : but whenever satisfaction is obtained on one, it is a bar to all the others. If the creditor collects his bond or note, he cannot pursue his other remedies, but may be compelled to reconvey. If he forecloses the right of redemption, by which he takes it out of the nature of a pledge, and appropriates it in payment, it will discharge the bond or note : and if he attempts to pursue one remedy after he has obtained satisfaction, on another, the mortgagor may be relieved by *audita querela*, or bill in equity.

Notwithstanding a decree of foreclosure, has been passed, yet a court of equity may open the foreclosure, and extend the time of redemption, upon just and equitable reasons : as where the mortgagor was prevented from redeeming by sickness, or some accident, without any negligence on his part : but applications to open foreclosures, must be made in a short time : for where the foreclosure has been for several years acquiesced in, and improvements made on the land, courts will not give farther time to redeem.

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CHAP.

## CHAPTER FIFTH.

OF THE DIFFERENT VIEW OF CONTRACTS IN LAW  
AND EQUITY.

**C**ONTRACTS are the principal object of equitable jurisdiction, and deserve a minute illustration.

The general principles respecting the execution and construction of contracts in law and equity, are the same : y but equity adverts to the substantial object of all contracts independent of the forms which they assume, and gives effect to the intent of the parties, by considering their acts as evidence of such a contract or agreement as will produce what is stipulated. Therefore any kind of written contract, if it expresses the intent of the parties to stipulate with a view to some particular thing, collateral to the contract itself, will in equity amount to an agreement respecting that thing, altho in form it assume a different character. \* Thus where the condition of a bond was, in consideration of so much money in hand paid, to convey and assure certain lands, it was held that such bonds were always considered in equity as articles of agreement or contracts to convey lands, or do some act, and that a specific performance of such contract, ought to be decreed.

\* And the construction will be uniformly the same in equity, altho the instrument has become void by some matter, ex post facto. As where a single woman seized of land, and designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to him and his heirs : and for that purpose, she previous to the marriage, gave a bond in two thousand pounds penalty, to the intended husband, conditioned, that in case the marriage took effect, she would convey her lands to him and his heirs : the marriage was had, the husband enjoyed the lands during his life ; and on his death, his heirs brought a bill in chancery against the heir of the wife to compel him to convey the lands of the wife to the heir of the husband. It was objected that the bond became void by the intermarriage. But it was determined that the impropriety of the security, or the inaccuracy in wording it, is not ma-

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y 1 Pow. Con 313.

\* 2 Vetz. 373.

\* 2 P. Wil. 243.



terial : for it is sufficient that the bond is a written evidence of the agreement of the parties, that the husband in consideration of the marriage, should have the land as her portion.

But the most essential and important difference in the consideration of contracts in law and equity is, that while the former only awards damages for a violation, the latter furnishes a more complete remedy, by enforcing a specific performance. <sup>b</sup> For as the end of all contracts, is the actual accomplishment of the thing stipulated, the measure of the damages by no means answered the object proposed, and was an imperfect remedy. Upon this ground courts of equity interfered, and dealt with the corrupt conscience of the party, when he refused to perform what he had stipulated, and to make the remedy adequate to the mischief, equity directed that to be done, which a man in honesty and conscience ought to have done of himself : that is, that the estate itself be settled, or it decreed a delivery of the thing itself, or a performance of what was stipulated according to the contract. <sup>c</sup> It is therefore a general rule, that a court of equity will decree any contract that ought in conscience specifically to be carried into execution.

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#### CHAPTER SIXTH.

### OF THE POWER OF COURTS OF EQUITY, RESPECTING CONTRACTS RELATING TO THINGS REAL.

**L**ANDS being of a fixed and permanent nature, we find that contracts concerning them, have claimed much more of the attention of courts of equity, than contracts of a personal nature : and a much more important object can be answered by the enforcing of the specific performance of real, than personal contracts. To investigate this subject fully, I shall consider,

1. On what Grounds, Courts will decree a specific performance of Contracts respecting Lands.
2. When they will set them aside, as unreasonable and fraudulent.
3. When they will refuse to interpose respecting such Contracts.

<sup>b</sup> 2 Pow. Con. 3.      <sup>c</sup> Gilb. Hist. Chan. 236, 237.

1. On

**x.** On what Grounds Courts will decree a specific performance of executory Contracts respecting Lands.

*d* This part of the jurisdiction of a court of equity, is discretionary, not only in cases where there is an election of two remedies, by applying to a court of equity for a specific performance, or by action at law, as in the common cases of covenants : but also in those cases, where there is no remedy on the agreement at law, so that unless a court of equity, will carry it into execution, it cannot be enforced at all. *e* But it is a general rule, that a court will not decree a specific execution of an agreement, on a petition, whereon damages would not be recovered at law in an action : and that the particular instances in which they have interposed, furnish exceptions to the general rule. *f* The true ground of distinction seems to be this : such agreements whereon an action at law cannot be maintained, by reason merely of a formal defect of the instrument, will be carried into execution in chancery. But that court will rarely enforce an agreement, whereon an action cannot be maintained, by reason of events not happening, as provided for by the parties, the absence of which, render the agreement ineffectual at law : because the same construction must be made on an agreement in equity, as at law.

*g* He that exhibits a bill for the specific performance of a contract or agreement, must in order to entitle himself to the aid of the court, shew that he has performed all that was contracted to be done on his part, or that he is ready so to do, but it is a rule of equity in contracts and agreements, that they must be decreed to be performed on both sides, and entirely, or not at all. And therefore, if it has by subsequent events, become impossible for the plaintiff to perform his part of the agreement, at the time of exhibiting his bill, he cannot be entitled to a specific performance of that contract which he himself is incapable to execute specifically. *h* But in these cases a distinction is made in equity, where that party who has performed part of his agreement, and is in no default for not performing the residue, is in such a situation, that he is not under any disadvantage from what he has done, and where he is not in such a situation : for in the latter case he shall have a specific

performance  
*d* 2 Pow. Con. 14. *e* Ibid. 16. *f* 1 P. Will. 243. *g* 2 Pow. Con. 17.  
*h* 1 Vez. 256. *g* 2 Pow. Con. 14. *i* Vez. 87. *h* 2 Pow. Con. 26.

good nature of the agreement from the other party. As where a husband conveyed a portion of his real estate, and agreed to furnish the vendee with a mortgage of such a value, as the husband might think proper to give, and afterwards the mortgage was not made, and the wife refused the agreement, he was held to be bound to perform it, notwithstanding the husband's death, and the estate be put in the name of a son, and the husband died in 1710, and he was going on to settle and to improve the estate. Therefore the death of the wife will not in equity alter his right to her portion.

A court of equity will not compel a purchaser to complete the purchase, if there is any substantial doubt as to the goodness of the title of the vendor, but he may not defend himself on pretence of some formal matter, being requisite to complete the title, when that circumstance is supplied by other matter, which makes it equally secure.

A Courts of equity in the construction of **executory contracts or agreements**, consider them as executed from the time of their being entered into, unless some other time be appointed for executing them, it being a principle, that where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done, and that he who made the agreement shall not by neglecting to perform it, be in a better plight, than if he had fairly, and honestly performed without delay what he agreed to. Of course when a contract is made for the sale of land, the whole estate is by the agreement parted with in equity, and the vender is considered as a trustee for the vendee. Upon this ground, it is held that the vendee shall be liable, if no laches happens on the part of the vender in fulfilling his contract, to all contingencies happening to it, in the intermediate space between the agreement, and the conveyance.

A court of equity will decree the specific execution of an agreement, notwithstanding the insertion therein of a penalty, in case of a non-performance: but this depends upon the nature of the agreement, for where the object of the agreement is damage only, there the penalty shall be the criterion of the injury.

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• A beneficial bargain will be decreed in equity : so likewise will one that happens to be a losing bargain ; for the same reasons and principles apply to both cases.

Tho parol agreements respecting lands are void by the statute of frauds and perjuries, both in law and equity, yet a general principle has been adopted, that where an agreement is in fact executed, it is taken out of the statute. It is therefore a nice point to be settled, to ascertain how far the contract must be executed to exclude the operation of the statute. The design was to prevent perjury, as well as fraud in setting up and proving mere parol agreements : but where they have been so far executed, as to evidence beyond a doubt the existence of the contract, the danger is removed, and the reason ceasing, the law itself ceases. It is therefore a general rule that when either the parties have in part executed the agreement, it is taken out of the statute, and that it would then be highly unreasonable and inequitable, not to compel a complete performance ; and parol evidence is always admitted to shew that the agreement has been in part performed : as where part of the purchase money has been paid ; or a deed has been made out and rendered ; or the purchaser has gone into possession of the land ; or the seller has delivered possession : but proposals or mere verbal agreements without the actual execution of any part, are within the statute. <sup>p</sup> It is a general rule that when the parties confess the making of the agreement, it is taken out of the statute, and the performance may be decreed. But where the defendant pleads that the contract on which the application is grounded was by parol, and demurs on that account, this is not such admission of the contract, ~~as~~ will take it out of the statute, but the petitioner must reply an agreement in writing, or the demurter will be judged in favour of the defendant.

<sup>q</sup> A person subscribing a deed, or any complete agreement, as a witness only, knowing the contents, it will be holden a signing within the meaning of the statute : for the meaning of the statute is to reduce contracts to certainty, and where the substance has been complied with, in the material part, the forms have never been insisted upon. The writing a letter to one's own agent, setting forth

<sup>n</sup> 2 Vern. 398, 423.    <sup>o</sup> Kirb. 400.    <sup>1</sup> Vez. 82, 297.    <sup>2</sup> V. z. 299.  
<sup>3</sup> Atk. 4. Finch. Pr. 519.    <sup>1</sup> Atk. 542, 12. Finch. Pr. 402, 560.    <sup>p</sup> 1  
Vez. 441. Finch. Pr. 208, 374.    <sup>q</sup> 3 Atk. 503.    <sup>1</sup> Vez. 7.

forth the terms of an agreement, as concluded upon by him, has been confirmed a signing with his name: that in all these cases the agreement must be fully and fairly stated, and more besides or preposals, or any writings that do not contain the substance of the agreement, are of no validity. Such is the rule that, in these cases it is apparent, that the party did not intend to be bound by the signing.

2. On what Grounds, Courts will set aside unreasonable Contracts.

It is a general remark that courts of equity will be much more easily persuaded to dismiss a bill, which has for its object the specific execution of an unreasonable contract, than to set aside a contract, tho' it be not strictly equitable on a bill for that purpose; for the latter is to deprive the party against whom it is preferred, of that to which by law he has a right: And if a court be prevailed upon to set aside such an agreement, it will be on refunding what has been paid bona fide, and making allowances for improvements.

The better opinion seems to be that the mere fact of a bargain being unreasonable, is not a ground to set it aside in equity, if the parties are of age, perfectly acquainted with their respective rights, each of them aware of what is done, free from any deception, and speak what they respectively mean: for contracts are not to be set aside, because not such as the wisest people would make, but there must be fraud to make void acts of this solemn and deliberate nature, if entered into for a consideration. But if there be any fraud in the transaction, than unreasonableness in the bargain, whether it be on the side of the vender or vendee, will be a good ground on which a court of equity may be applied to set it aside: and agreements that are not properly fraudulent in that sense of the term, which imports deceit, will nevertheless be relieved against on the ground of inequality, and imposed burden or hardship on one of the parties, to the contract; which is considered to be immoral and unconscionous. As if a covenant should be inserted in the mortgage, that if the interest be not punctually paid at the day, it shall be turned into principal, and bear interest,  
equity

**equity will relieve against it as fraudulent, because it is considered as unjust and oppressive.**

*In* cases of fraud or imposed hardship on one party, by another, it is no answer to the relief prayed, to say, that the party applying was a partaker of the crime ; for this cannot be said in any case of oppression, with regard to the party oppressed, since it is that very hardship that he is obliged to submit to, that constitutes the crime. Therefore a compliance with terms imposed, that are illegal, as the payment of usurious interest, will not alter the relief in a court of equity. Consequently the maxim, that to him who acts voluntarily, no injury is done, does not hold in cases of fraudulent or hard bargains, imposed upon one party, against which equity relieves. It is only the corrupt conscience of the persons, which imposed such bargains, that is to be considered ; and it is that corruption alone which entitles the oppressed party to relief. But where both parties are criminal in an equal degree, there the maxim that to him who acts voluntarily, no injury is done, applies : as in the case of gamblers ; for if two persons will sit down, and endeavour to ruin each other, if one pays the money won, the law, will not enable him to recover back—or if he does not pay, the other cannot recover it—for as there is no oppression on either party, equity cannot relieve.

\* Equity may set aside a contract, which is an unreasonable advantage taken of a necessitous man, or where the bargain was not fairly obtained in respect of the circumstances the party was in. \* If such inequitable advantages be taken of a man's circumstances, and the securities taken from him, be outstanding, so that the party holding them is to be redeemed : a court of equity will decree, that on paying the sum bona fide due, the securities shall be given up : but if he has received more than is due, he shall refund the surplus and deliver up the securities.

† Inadequacy of price, abstracted from all other considerations, seems of itself to furnish no ground on which a court of equity can set aside or relieve a party to a contract : for the law has never fixed any certain proportion, that the price must bear to the thing purchased : but if the cause of the inequality of the price,

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 f 1 P. Will. 210.    † 2 Pow. Con. 150.    \* 3 P. Will. 290.    1 Vern.  
 465.    \* 3 P. Will. 294.    † 2 Pow. Con. 152.    2 Vol. 518.

be founded in circumstances from whence the court may conclude that the consent of the party was not free, or was conditional, thro mistake, fear, or misrepresentation, or under the impulse of fraud, known to the other party, then such contract may be set aside. \* So if the inequality of the price be such as to evince an over-reaching on one side, and imbecility on the other: that the person did not understand the bargain he made, or must have been so oppressed, as to be glad to make it, knowing its inequality, it would seem reasonable that the contract should be set aside.

z Bargains originally oppressive, as well as those gained thro fear, may by the subsequent act of the party oppressed be made binding: for where a man is fully apprised of his right, and understands what he does, whatever may be the nature of the original transaction, a subsequent confirmation will make it good: because if men who are free agents, will with open eyes, ratify invalid agreements, a court of equity will not relieve them. y But if such confirmation were obtained fraudulently, a court of equity would break through it, and impeach the original contract, however deeply entrenched behind fortifications of this kind.

z Contracts may be set aside as fraudulent, that are intended to impose upon and deceive other persons, not parties to the fraudulent contracts. Such as marriage brokerage contracts.

a Courts of equity from views of national policy, have set aside all catching bargains, or contracts made with heirs, or expectants, for the disposal of their expectancies, considering them as intrinsically corrupt, fraudulent, and unconscionable; encouraging disobedience and extravagance in heirs and expectants, on the one hand, and avarice, fraud, and imposition on the other. And no subsequent act of the heir, though voluntarily, and not under an apprehension of legal distress, will help such a contract, if the heir at the time be under a misapprehension, and not fully apprised of the nature of his right. b But if the contract for an expectancy be expressly shewn to have been free from fraud or imposition, and the vender being fully informed, and with his eyes open, ratify the contract, he will by such new agreement bar himself of the relief, he might otherwise

\* 2 Pow. Con. 158. x 2 Vez. 152. y 2 Pow. Con. 164. z Ibid. a 1 Vern. 76. b 1 Vern. 14. c 1 P. Will. 310. d 2 Vez. 159.

otherwise have had in a court of equity. But such ratification must be after full information, freely, without compulsion, and at a time when the vender is free from all restraint or apprehension from the person, on whom the expectancy rests, and when it cannot be said, that there is any person, on whom any deceit can be committed, by reason of such new agreement, and there is no impediment against the party, supposed to be imposed upon, seeking relief by disclosing his case to a court of justice.

• An agreement may be set aside, by reason of a mistake in the parties making it, if the point misconceived, be the cause of the agreement; for if an agreement be entered into, upon the presumption by one of the parties, of a fact that is not really so, as the party believes, the agreement as to him is of no force, because he did not give his assent to what is agreed upon, absolutely, but upon certain conditions, which are not verified by the event. Upon the same principle. it has been held that if a party at the time of entering into an agreement respecting a claim, capable of being precisely ascertained, be, at the time of contracting, ignorant of the precise value of it, but stipulates under an idea, and with an intent that what he receives shall be equal in value, to what he has a claim to; this will furnish a sufficient ground to a court of equity to set aside the agreement, if the thing to be received turn out not adequate to the price of the claim, when the value is accurately adjusted. • But these cases must be distinguished from those, where the right, or thing stipulated about, is doubtful, and no ignorance, or want of information can be pretended, respecting it, for in cases of that kind, it is not necessary for a court of equity, after an agreement, if there be not a plain mistake shewn, contrary to the intent of the parties, to resort to the original right of the parties. That the right is doubtful, is sufficient ground to support an agreement respecting it.

• An agreement for the sale of an estate, which from the nature of it, when compared with the circumstances of either of the parties to it, furnishes decisive evidence of his being surprised, will be set aside in equity, tho there be no proof of surprise, fraud, or circumvention, and tho a conveyance has been made pursuant thereto. • A suppres-

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 • 2 Pow. Con. 196, 197. • Ibid. 200. • 2 Vern. 185. • 1 P. Will.  
 341.



tion of the truth, or a misrepresentation in a point material, will be deemed a gross fraud, and be sufficient ground to set aside the contract. As where the vendor misrepresents the quantity of land proposed to be sold, this will set aside the contract.

*g* If a bill be brought for the performance of a thing, for the non-performance of which, a penalty is recoverable at law, the plaintiff must by his bill, waive all benefit of forfeiture, or it will be a good cause of demurrer. A court will not suffer an advantage to be taken of a penalty, or forfeiture annexed to an agreement, where the substance of the contract may be obtained, notwithstanding the penalty be not levied. Nor will equity permit any advantage to be taken of a penalty or forfeiture, where compensation can be made. Equity will not relieve against an agreement, tho' from the terms of it, it seems to be in the nature of a penalty, if it be not really so. In all cases where an agreement is voluntary and in favour of one of the parties, the condition the penal in its effects, will be binding on the favored party, if the agreement be not strictly performed. *h* As where a creditor agreed to take a less sum, than his debt, if paid precisely by such a day; if it be not paid by the time, the creditor cannot be compelled to take the same sum afterwards. Equity will give relief against the penalties of bonds, for the performance of covenants, and by our statute, courts of law on a suit upon the bond, are vested with the power.

3. Of the Principles on which Courts refuse to interpose respecting contracts.

As the object of the interference of courts of equity, is to give a more compleat remedy, and render more adequate justice than can be done at law, by enforcing a specific execution of the contract, they will not interpose where the matter lies in damages only; and courts of law can give as effectual remedy as equity. Courts of equity have a discretionary power in the exercise of this branch of their jurisdiction, but their discretion is founded on certain grounds, and governed by fixed rules. *i* The leading maxim is, that every agreement to merit the interposition of a court of equity

equity in its favour, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, consistent with the general policy of a well regulated society, and free from fraud, circumvention, and surprise : or at least such an agreement must in its effects ultimately tend to produce a just end : otherwise courts of equity will not decree a specific performance. If there be a concealment of a material circumstance, a misrepresentation, if the agreement be unreasonable, exorbitant, and made with a person of weak intellects, if there be want of certainty and mutuality, courts will refuse to interpose and decree a specific execution of the contract. † Nor will they make a decree, that will be vain and nugatory, or direct any thing to be done that must be useless.

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CHAPTER SEVENTH.

OF THE POWER OF COURTS OF EQUITY RESPECTING  
CONVEYANCES OF THINGS REAL.

**I**N the foregoing chapter we considered executory contracts respecting lands : we are now to consider the jurisdiction of courts of equity, respecting the title of lands, where the conveyance corresponds with the legal forms, and the contract has been executed. This is an important branch of their authority : they have the power to set aside the conveyance of him who has the legal title, and may decree that he shall convey to him who has the equitable title.

Conveyances of lands may be set aside, not only for fraud practised by one party on the other, but where a fraud is intended to injure creditors and purchasers.

It may be remarked generally, that the same circumstances of fraud, which will justify courts of equity to relieve against an executory contract, will justify them in setting aside conveyances where the contract has been executed. I therefore in all instances of imposition, misrepresentation, concealment of material facts, taking an unfair advantage of a weak and simple man, or an unreasonable advantage of a necessitous man, by which conveyances of estate are obtained

obtained, a court of equity may interpose. I shall mention a few cases to illustrate these general principles.

A person agrees to purchase of another who cannot read, a certain part of his farm, procures a deed to be drawn, comprehending in the description, the whole of the farm, or more than was intended to be sold, and reads it to the party, as containing only the quantity agreed to be sold, and prevails on him to execute it; this fraudulent act, will authorise the court to set aside the conveyance. So where a collector having rates against a non-resident proprietor, applied to him to collect them, and offered to purchase the lands. By misrepresentation, he induced the owner to agree to sell a certain quantity of land, at a certain price, and then by art and fraud procured such a description to be inserted in the deed as comprehended a large tract of land, which the seller had no idea of owning or conveying, tho he was in fact the owner. Such circumstances of imposition, were considered as a proper ground for a court of equity to nullify the conveyance.

• Where a devisee under a will defectively executed, represents to the heir, that the will was lawfully executed, and for a small sum obtains a release from him, such release may be set aside, for the devisee is acquainted with a fact, which if the heir had known, he would never have conveyed, and as the devisee suppressed the truth, and suggested a falsehood, for the purpose of obtaining the release, it ought to be set aside. The general rule is, that whenever a deed is obtained by the suppression of the truth, or the suggestion of a falsehood, the imposition is of such a nature, as will authorise the interposition of a court of equity.

• Where a person claims a right against another, who denies it, and they compound, and the claimant releases, if he afterwards finds full proof of his right, yet his release shall not be set aside, because the right was contemplated in the settlement, as a matter in dispute. Relief can be had only where the person in the settlement was ignorant of his right, or the same was concealed from him.  
 • So where a settlement is made upon the supposition of a right, and it afterwards comes out to be the other side, yet the agree-

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ment is binding, for the compromise was of a doubtful right, and so contemplated by the parties. So where the parties have all equal means of knowledge, and have a full opportunity to know the fact, and make a mistake, equity will not relieve.

*f* An artful servant who had great influence over a weak master procured a conveyance of real estate, to qualify him to kill game according to the English law, and a fictitious consideration was inserted in the deed. The servant then claimed to hold the estate by the conveyance, as a gift, and on a trial at law his title was established. But equity relieved on the ground of fraud, imposition and undue influence, and the rule was laid down, that where a consideration was expressed in the deed, the claimant could not set up a different consideration, or claim as a gift, and that such an attempt was an evidence of fraud. The party imposed upon, at whose suit the conveyance was set aside, was not so weak as to be unfit to manage his affairs, but only so weak as to be liable to be imposed upon.

A person obtained a conveyance without consideration, from another, over whom he had great influence and command, and who, tho he could not legally be considered as a lunatic, or idiot, yet was a very weak man, unfit to manage his business, and liable to be imposed upon. Such conveyance was set aside in favor of the heir, and the circumstance of not reading the deed to the person, was considered as a badge of fraud. Tho it appeared that he intended to disinherit the heir, yet as it appeared that such intention was owing to the fraud of him who obtained the conveyance, it was determined that this would bring it back and revert it in the heir. Here the relief is grounded on the fraud and imposition, without any adequate consideration, for if the agreement had been fairly made, and a reasonable consideration given, it would have been binding. So far then, equity may relieve weak and foolish men, from their agreements, and this is absolutely necessary to protect them against sharpers: but if a man of common sense, in the exercise of his reason, makes a foolish bargain, not having been deceived by any misrepresentation or suppression of the truth, he can have no redress. For equity may relieve the weak and foolish

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ish, from their contracts, when an unfair advantage is taken of their weakness or folly : but will never relieve men of sense from their contracts, when they were overtaken by weakness and folly.

Conveyances which operate to the prejudice of purchasers, may be set aside for fraud. Faulkner having a deed of land unrecorded, sold the land to Stedman for a debt, who supposed the deed to have been recorded. Afterwards, Faulkner with a view to defeat Stedman's title, applies to the person of whom he purchased, for a new deed to his son, on giving up the deed to himself, stating that as his deed had not been recorded, a new deed might on that being given up, be safely given to his son, and concealing the fact, he had given a deed to Stedman. The original vender suspecting no fraudulent design, took up the old deed and gave one to the son, which was recorded, and which defeated Stedman of his legal title. He then brought his petition in equity against the Faulkners, and the original vender. Faulkner attempted to rebut the equity of Stedman's claim, by shewing that he did not owe the debt for which the deed was given ; and that therefore, he was justified in taking such a measure to defeat it. On enquiry, this fact was found to be false, and the court set aside the deed to the son, and decreed that the person who conveyed to Faulkner, should convey to Stedman.

Creditors may apply in equity to have deeds vacated, which were fraudulently calculated to defeat their title, tho generally speaking, they have remedy at law, as fraudulent conveyances are void at law, against creditors.

E. G. was largely indebted, and having property, purchased lands of Tilden, and took the deed to his father, to screen the land from his creditors. The father mortgaged as collateral security, part of the land to Davis, for his own debt. Fisk, one of the creditors to the son, levied an execution thereon as his estate, and then applied to Davis, and requested him to levy the execution which he had obtained for his debt secured by the mortgage on the other lands of the father, and permit him to satisfy his debt, by the land taken by his execution—But Davis refused. Fisk then brought

brought his petition in equity, against the father, Davis, and Tilden, praying that the conveyance from Tilden, to the father, and from him to Davis, might be set aside, and Tilden ordered to release to him. To this there was a plea in abatement, and it was argued that Davis was a creditor to the father, and therefore stood in equal equity with Fisk, and that in like cases, the condition of the possessor was best. For Fisk it was contended, that the land really belonged to the son, who was his debtor, that Davis might relinquish his claim upon the mortgaged premises, and secure his whole debt by levying on the other lands of the father: that unless Fisk could hold the lands in question, he must lose his whole debt, and that it was a rule in equity, \* that where one claimant has more than one fund to resort to, and another has only one, the first shall resort to that fund on which the second has no lien. The court sustained the petition—but it is was withdrawn without a trial on the merits. The decision however settles the point that where one claimant has several funds to resort to, and another has but one, that the first shall resort to the fund which is out of the reach of the second—and that they would have set aside the deed and ordered conveyances which would have been competent to such purpose.

If this case had been tried on the merits, there might have been a question whether Davis had two funds to resort to, as the land in question was all that was mortgaged, and he had only a legal right to levy his execution on other estate of G. without having a legal lien thereon: but this makes no difference in point of principle, for if Davis had two funds, then the decree must have been in favour of Fisk.

When debtors attempt to screen their lands from being taken on execution for their debts, by their creditors, courts of equity will interpose. Thus if a man having a deed of land, neglects to record it, for the purpose of preventing the levy of an execution upon it for his debts, the creditor may attach and cause his execution to be levied in the same manner, as tho the deed was recorded, and then by an application in equity, he may compel the vender to release to him, by which he will acquire a legal title. In a similar case the vender after the land was attached, took back the deed

deed on an agreement that the same should be void, for the purpose of defeating the creditor, who had attached. But he was decreed, to release.

If the parties in conveying lands should make any mistake in drawing the deed, in the description of the land, or the like, and the party to whose advantage the mistake operates, should refuse to rectify it, he might be compelled by a court of equity. So if the conveyance should be defective, wanting certain legal requisites, yet if the contract of sale was bona fide, and an adequate consideration given, by which the purchaser acquired an equitable title, he who has the legal title might be compelled in equity, to release to him who has the equitable estate.

A court of equity may decree the conveyance of lands, where a person has by a mistaken apprehension of the subject given up his contract, and has no remedy at law. \* A man purchased lands of two joint-tenants, and gave to them jointly a note for the payment, and took from them a bond for a deed on payment of the money within a certain time. Before that time one of the joint tenants died, having appointed the other his executor. Within the time limited the purchaser paid the money to the survivor, and took from him a deed of the land. As the survivor was executor to the deceased, the purchaser supposed that the deed vested him with a complete title to the land, and upon that mistaken idea, gave up his bond for a deed. He took possession of the land and occupied it for a long time, when the heirs of the deceased joint-tenant, being sued for a debt contracted by him for the purchase money of the land in question, brought their action at law for the recovery of the land. It was apparent that the purchaser, (as the right of survivorship is not admitted by our law,) had not a legal title; but as he had paid for the land, to the person who had a right to receive the money, (the surviving joint-tenant being one of the promisees in the note, and executor to the deceased,) he clearly had an equitable title: and the giving up the bond, being in consequence of a mistaken apprehension respecting the effect of the conveyance, could not in good conscience prejudice his claim. On a bill in equity, the court decreed that the heirs who claimed the land, should release

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to the purchaser, and laid a perpetual injunction on all proceedings at law.

y Where a deed or will, is suppressed by a person deriving an advantage from such suppression, the party claiming under such deed or will, may by application to a court of equity, obtain a decree to hold and enjoy the estate, and the suppressor shall be ordered to convey.

\* Bill in equity may be brought to compel a person who has the deeds of another, to deliver them up ; for in trover damages only could be recovered.

#### CHAPTER EIGHTH.

#### OF THE POWER OF COURTS OF EQUITY RESPECTING CONTRACTS OF A PERSONAL NATURE.

**U**NDER this head I shall consider, 1. The power of a Court of Equity, to decree the specific performance of personal Contracts.

2. The power of a Court of Equity to enforce the performance of a personal Contract, where there is no legal remedy.

3. The power of a Court of Equity to set aside a personal Contract.

4. The power of a Court of Equity to relieve in case of Mistakes in personal Contracts.

1. The power of a Court of Equity, to decree the specific performance of personal Contracts.

It is a general rule, that where the matter respects personal things, and lays merely in damages, there the remedy is at law only. As well, because courts of law can give as full and effectual reparation in such cases as courts of equity, as because the ascertainment of damages is the proper business of a jury, and cannot be adjusted by the conscience of a chancellor. But where the specific execution of a personal contract, is necessary to do effectual justice, and answer the substantial intent of the parties ; courts of equity will decree the agreement specifically, tho otherwise

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y 1 P. Will. 738.    2 2 Ale. 306.    3 2 Pow. Cos. 25, 27.



wife the proper remedy, would be the recovery of damages by a suit at law. Such interposition will be in cases of contracts to perform something relating to personal things, at several distinct times, or at a future period. Such contracts must be fair, equal, and just in all their parts, like real contracts, to induce a court to decree a specific performance. A few instances will unfold the extent of this branch of equitable jurisdiction.

*b* Two persons agreed with another to purchase several parcels of wood, of a certain description, standing in a certain place, for the sum of £3500, at six several payments, in six years, and to have eight years to dispose of the same, and that articles of agreement should be drawn and perfected with usual covenants, as soon as convenient. The seller brought his bill for a specific performance. The court remarked that they would not entertain bills for the specific performance of agreements, relating to stock, corn, and articles in general, of a personal nature, because a more compleat and expeditious remedy might be had at law, and the value of such articles were fluctuating: that the proper cases in which to grant specific relief, respected lands, which were of a certain and permanent nature: but that notwithstanding this general distinction, there might be some instances, in which adequate relief could not be had at law, by the usual method of granting compensation by way of damages: and that therefore specific relief ought to be decreed. This case was considered as a proper subject for such equitable interposition; but it appearing on evidence, that the agreement was unfairly obtained, and by misrepresentation, the bill was dismissed on that ground.

*c* A specific performance of articles for the purchase of eight hundred tons of iron, to be paid for in a certain number of years, by instalments, has been decreed. So has a specific performance of a lease, relating to allum works and the trade thereof, been decreed, because it would have been greatly damaged, if the covenant had not been specifically performed. If a ship carpenter should contract for the purchase of a great quantity of timber, growing on land which might be convenient for his use, by the vicinity of it, a specific performance of the contract only could answer the jus-

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tice of the case. *d* If two partners should enter into an agreement by a memorandum, to carry on a trade together, and it should be specified in the memorandum that articles should be drawn pursuant to it : and before they were drawn, one of the parties should fly off, and a bill should be preferred, there can be no doubt but that a court would decree a specific performance of the contract, tho' of a personal nature. *e* But a specific performance of a contract to transfer South-Sea stock, was refused to be decreed ; because the remedy was compleat at law, as the party by the money recovered in damages could buy such stock, which made it different from land, because one parcel of land might be more pleasant or convenient than another, but all South-Sea stock was alike.

Here a general maxim must be observed, that there is a difference between contracts, that are immediately to be executed, and those which are to be executed at distant and different times, in respect of their specific performance : that where contracts are immediately to be performed, and are broken, adequate damages can be given by a court of law, but where they are to be executed at different times, and are to be a long time in the execution, there a specific performance only can give compleat relief.

2. The power of a Court of Equity to enforce the performance of a personal Contract, where there is no legal remedy.

This may be done where the contract ceases to be obligatory by operation of law, or where it is defeated by the act of the party. In all cases of joint contracts, if one of the obligors die, the contract survives against the surviving obligor, and the executor or administrator of the deceased, is discharged at law from the obligation : but in case the surviving obligor is a bankrupt, and unable to pay the debt, then the estate of the deceased obligor, is in equity considered as holden to pay it ; and may be pursued in the hands of the executor or administrator, till satisfaction is obtained. *f* This principle has been repeatedly recognized by the the courts of this state, and petitions of this description have been frequently sustained.

*g* A man before marriage gives a bond to a woman to leave her a thousand pounds, if she survives him, and then marries her,

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*p* 2 Pow. Con. 319.      *v* 1 P. Will. 570.      *f* Kirkl. 147.  
*g* Finch. P. 207.

The husband dies intestate ; here tho the bond became void by the subsequent intermarriage, yet equity will enforce the fulfilment of it, because it is in the nature of a marriage agreement.

Courts of equity may grant relief upon personal contracts, where the party against whom it was intended to operate, has defeated it at law by a wrongful act. *b* Little was indebted to Warner in the sum of one hundred pounds on account of suretiship. Warner proposed to give this debt to his son Reuben, as part of his portion, and to take two notes from Little for fifty pounds each payable to Reuben. Warner being illiterate, and unable to read, trusted wholly to the honesty, and uprightness of Little ; who being disposed to take advantage of him, gave the notes for ten per cent. interest, with an intention to defraud Warner of the money. Warner delivered the notes to his son, and when on his decease, they came into the hands of Fowler, his administrator, they had been altered from ten, to six per cent. interest. Fowler put the notes in suit, and Little taking advantage of the alteration, avoided them at law. Upon this Fowler preferred his bill in chancery stating the whole case and praying for relief.

It was contended on the part of Little, that if the note had not been altered, that a recovery might have been had at law, for the plaintiff might have shewn that the giving of the note for ten per cent. was an imposition, and he might have given unlettered, in evidence, which would have made the note good at law. And as the legal remedy on the note, was defeated by the act of altering it, there could be no relief in chancery. But the court determined, that as the first wrongful act was done by Little, and as he gave a note void upon the face of it, for the purpose of defrauding Warner, such void note did not extinguish the original debt, and that the subsequent alteration could not purge the original fraud, and wrong of Little : therefore he ought to pay the debt, which existed in justice, and they decreed the same accordingly.

*i* A man voluntarily gave a woman a bond in the penalty of one thousand pounds, conditioned, that if he did not marry her within a twelve month after date, he would pay her five hundred pounds. Soon after, under pretence of reading it, he took it against her consent

*b* Little vs. Fowler, S. C. 1785.    *i* 1 Atk. 287.

Sent : and carried it away. A bill was brought to oblige him to deliver the old bond, or if cancelled, that he should execute a new one. The plaintiff dying pending the bill, her mother as administratrix, revived it against the defendant. The court were of opinion, that as the bond was gone by the default of the defendant, the plaintiff was not only entitled to a discovery, but relief, by the payment of the money, and decreed that the defendant should pay the principal sum of five hundred pounds with the interest from the filing of the original bill.

\* If the principal procure a bond or note to be delivered up by fraud, equity will set it up against a surety, tho extinguished at law. But where the creditor takes a new bond, without the surety, (having delivered up the old,) and the obligor becomes a bankrupt, he may not call on the surety.

† Where a bond, or note is cancelled by mistake or accident, or where they are released and discharged by mistake, courts of equity will set them up against the debtor, and decree payment, tho the remedy is gone at law. In like manner, if they are burnt, destroyed, or lost by any accident, equity may grant relief.

3. The power of a Court of Equity to set aside personal Contracts.

It may generally be remarked, that personal contracts may be set aside upon the same principles, as executory contracts of real nature : but I shall illustrate the subject by a few adjudications.

" An action had been brought by Lankton against Scott and his wife, for slanderous words, which was submitted to arbitrament. Scott not being able at that time to justify the words spoken, a sum in damages was awarded against him, for which he executed his note in fulfilment of the award. The note was put in suit, and while pending, Scott brought his petition, stating, that after the execution of the note, Lankton had confessed that the words spoken by the wife of Scott, for which he had obtained the note by way of damages, were true ; that he had been guilty of great injustice in prosecuting them : and that the ruin of his reputa-

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tion was owing to his own wicked conduct, and not to the slanderous words of Scott, and his wife; praying that the note be decreed void. The court were of opinion, that as the plaintiff prosecuted a person he knew to be innocent, but whom through his suppression of a fact, he made to appear guilty, by which he obtained a note for damages, that such note was unduly and unconscionably obtained: and that the fraudulent act of suppressing the truth, which afterwards appeared by his own acknowledgment, furnished a strong ground of relief, and they decreed the note to be void.

\* All marriage brokerage contracts, given for assistance in procuring marriages, are void; because they militate against the general welfare of society. Therefore a bond or agreement to give money to any one, to use any influence over another, to procure a marriage, or to give money if a marriage can be obtained, would be void. So a bond to give money in case of marriage is void.

o All contracts made in fraud of marriage contracts, are void, as where the father covenants to settle a certain estate on the marriage, and the son privately agrees to repay back a certain part to the heir: and so in all cases where there is private agreements between some of the parties, to deceive the rest, and which is contrary to the agreement made with those intended to be deceived.

p A bond given in consideration that the wife of another should use the influence and power she had over the grand-father of the obligor, an old man of eighty-two, that he should dispose of his whole estate to the benefit of the obligor, and give security that he would not alter his will; decreed to be void. q So is a bond given to another, in consideration, that he shall procure for him a certain office. r Bonds and contracts obtained by fraud, from weak men, and by taking an undue advantage of necessitous men, are void. s Courts of equity may relieve in case of usurious contracts, but it is on the principle of directing the payment of what is justly due, expunging only the usurious part.

t The having been in drink, is not any reason to relieve a man against any deed or agreement, obtained from him under those circumstances

\* 1 Vez. 556. 1 Chau. Rep. 27. 1 Pow. Con. 174. 1 P. Wil 118.  
 o 1 P. Wil. 436. Finch Pr. 512. 1 Vez. 277. p Ibid. 276. q 3 P. Wil.  
 397. r Ibid. 129. 2 Vez. 282. 2 Atk. 34. s 1 Vez. 319. 2 Ibid. 567.  
 t 3 P. Wil. 130.

circumstances ; for this would be to encourage drunkenness : but if a man is drawn in to drink by the management and contrivance of another, for the purpose of taking advantage of him, then a contract obtained from him by such person is void.

\* A bill was brought for the specific performance of a lease ; the defendant was admitted to adduce parol proof of a different subsequent agreement, respecting the same subject : and the court dismissed the bill. In equity a written contract may be discharged by parol.

4. The power of courts of equity to relieve in case of mistakes in personal contracts.

Courts of equity will relieve in respect of mistakes in contracts, by compelling the performance of the contract, according to the true intent, and meaning of the parties, or by setting aside the contract itself.

\* A parol agreement was made, that Chapman, and Lewis should convey certain lands to Allen, and that he in part payment should pay an execution against Chapman in favor of Sumner. Pursuant to this agreement, the land was conveyed, and a bond at the same time was executed by Allen, with intent to indemnify Chapman against the execution, but by mistake the execution was misdescribed in the bond, as being against Chapman and Lewis, when in fact it was against Chapman only. Chapman was compelled to pay the execution, and in an action on the bond, failed of a recovery, by the misdescription of the execution. He exhibited his bill in chancery, praying for relief. On a plea in abatement in the court of common pleas, the petition was abated, but on writ of error their judgment was reversed by the superior court, on the principle, that parol evidence was admissible to prove a mistake, in a written contract, y that it was equal whether the omission was insisted on, as a mistake, or fraud, \* and that mistakes, and misapprehensions in the drawer of deeds, contrary to the design of the parties, is as much a ground of relief, as fraud and imposition. Upon a trial, the mistake being proved, the court decreed that Allen should pay the amount of the execution, against which the bond was intended to indemnify Chapman.

\* 2 Vez. 299.    \* Kirb. Rep. 399.    y 3. Atk. 288.    \* 2 Ibid. 203.  
 & Vez. 317.

\* A man agreed to be bound in a bond, as surety to another, and signs and seals it accordingly, but by the neglect of the clerk, his name was omitted to be inserted in the bond. The obligee shewed to him the bond with his name and seal, and demanded payment, and threatened to sue him, unless he would give fresh security ; to which he agreed : but afterwards discovering the mistake, refused, not being bound by law. But he was compelled in equity : for here was an accident that was proper for the cognizance of a court of equity, and the hand and seal was sufficient evidence on which to ground the relief.

† A written agreement by mistake of the drawer, was drawn contrary to the intent of the parties, as appeared by minutes, and calculations made by them at the time. Parol evidence was admitted to prove this mistake, and the court decreed that the minutes should be considered as the agreement.

\* A person made an assurance upon his life, intending it as a provision for his wife in case of his death. By mistake the policy was made to himself, his executors and administrators, instead of being made payable to his wife. He died within the time for which his life was insured, was insolvent, and the money was paid to his administrator. His widow applied to the superior court, as a court of equity for relief, on the ground of the mistake, and the court on that principle, ordered the administrator to pay to her the sum he had received on the policy ; for they said that parol proof was admissible to rebut an equity, or to oust an implication ; that if the question be what the writing is, or what is the meaning and construction of it, the writing must speak for itself, and parol proof is not admissible to vary, or contradict it : but when the question is, what the writing ought to be, and whether by fraud, or mistake, it is different from what the parties intended to have made it, or it ought to have been, parol proof may be admitted for that purpose, otherwise the party injured by mistake or fraud, would be forever without remedy.

In all cases where a bill is brought for the performance of a written contract, equity will admit the defendant to adduce parol proof of a mistake in the contract, and if the mistake is material,

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\* Finch. Pr. 309.    † 1 Vez. 456.    \* Parsons vs. Holmes, S. C. 1793.

courts will refuse to decree a performance of the contract. Thus on a bill for the performance of a lease, the defendant was admitted to adduce parol evidence, to shew that a part of the contract was that the plaintiff was to pay the rent clear of taxes, which was omitted by him in drawing the lease. The court refused to enforce the performance of the contract.

Equity may set aside written contracts, when by mistake they are made different from the intention of the parties: and enjoin the parties not to proceed at law. If a recovery be had on such contract, they might order the money to be refunded by him, who had obtained it wrongfully, by force of a mistaken contract. But in these cases, they would probably interfere on the ground that the contract actually made should be performed.

Courts of equity will decree an agreement, notwithstanding the plea of its having been entered into under a mistake, if the effect of it be to dispense with a forfeiture: because they always favour contracts, that retain their intermeddling in cases of that kind. But in cases where if there be any mistake, it is the mistake of all the parties to the agreement, and no one is more under an impression than another, courts of equity hold that to shake them on that account would be mischievous, tending to make all agreements vain and nugatory. And in such case the mistake is not the occasion of the promise: therefore the act is valid, there being nothing wanting of the true assent on all sides. If parties are entering into an agreement, and the instrument containing information respecting that, in which the mistake is said to be; is lying before them and their counsel, while the draughts of the agreement are preparing, the parties will in equity be supposed to be acquainted with the consequences of law, as to those points, and none of them will ever be relieved under pretence of mistake or surprise, when such circumstances attend the case; for it is each of their business to search out the truth.



## OF THE OTHER POWERS OF COURTS OF EQUITY.

**I**N this miscellaneous chapter, I shall consider the residue of equity jurisdiction, and which could not be classed under any general head.

1. Equity will protect the assignment of a chose in action, and the general rule is, that whoever takes the assignment of a bond or note, or other thing in action, takes it subject to all the equity in the hands of the original obligee : / but length of time and circumstances may vary that, and make the case of the assignee stronger, as where a bond taken from a son, payable in six months after the death of his father, if he survived him, otherwise to be void, which coming under the description of a catching bargain, was void in equity : but no bill being brought in several years for relief, and the bond having been bona fide assigned for a valuable consideration, the court refused to relieve.

If the assignor of a bond or note, interfere in the collection, the assignee has sufficient remedy at law, by force of the indorsement : the only case in which equity has occasion to interfere, is where the assignor being a bankrupt and unable to make good his indorsement, then if the debtor having notice of the assignment, will afterwards pay the sum due on the bond or note, to the assignor, and take a discharge therefrom, & he will on a petition in equity be compelled to pay the same to the assignee ; because it was a fraudulent and dishonest act, to attempt to cheat the assignee out of the debt, by making payment to the bankrupt assignor.

2. We have no statutes authorising off-sets of debts to be made : but the courts of equity in certain cases have decreed it, where justice required. In all cases of insolvent estates, where there are mutual demands, tho' of a different nature, they are to be off-set : and if the administrator or executor of the deceased insolvent person, refuse to do it, a court of equity will compel him. In cases where a bankrupt has a demand upon a man of property, who has another demand on him; if the bankrupt refuses to off-set his demand, he may be compelled by a bill in chancery. <sup>man</sup> & Lee, a

f 1 Vek. 122, g Russell vs. Cornwell, 8. C. 1794. & Lee vs. Welch, 8. C. 1785.

man of large property, had sundry executions against West, a bankrupt, who had one execution against Lee, but refused to offset it, and attempted to collect it. Lee exhibited his bill in equity and obtained a decree that the execution of West should be offset on his executions against him.

3. Courts of equity cannot compel the specific performance of an agreement, to submit a controversy to arbitrament : for such submissions are usually conditional ; so that the award be published in some certain time : and it is not in the power of a party to oblige the arbitrators to proceed to a hearing and decision of the matter in dispute : and no man is to be decreed to do an act which it is not in his power to perform. <sup>1</sup> But courts of equity exercise certain powers respecting awards : they can set them aside for misbehaviour, collusion and corruption in the arbitrators. <sup>2</sup> So awards may be set aside, and equity will relieve, where the arbitrators go upon a plain mistake in point of law or fact : but there must be palpable mistakes, such as the arbitrators would have corrected, if they had been better informed : but where the points were doubtful, and the arbitrators exercised their judgment, tho they may have erred in opinion, yet this will be misjudging, and not a mistake, and therefore no ground to set aside the award. This is all the power that courts of equity can exercise in relieving against awards : but in some cases they may decree a specific execution of an award.

<sup>3</sup> A man having a dispute with his sister respecting a tract of land under their father's will, agreed with her husband, and entered into a bond in a penalty of two hundred pounds, to stand to the award of arbitrators. The arbitrators awarded that the brother should pay ten pounds on a certain day, and thirty pounds on another, and that the husband should procure the wife to join in a conveyance of the land to him. The brother paid the ten pounds at the time, which was received, and tendered the thirty pounds to the husband at the time, who was willing to receive it, but would not execute the deed. On a bill for a specific performance of the award, it was objected on the part of the defendant, that no bill had ever been sustained for the specific performance of

<sup>1</sup> 1 Ves. 444. <sup>2</sup> 3 Atk. 539. <sup>3</sup> Ibid. 494. <sup>4</sup> 3 P. Will. 187.

an award : and that it was unreasonable, because it required that he should procure his wife to join in the conveyance, which it might not be in his power to do : but the court determined that it was a settled principle, that where a husband for a valuable consideration covenants, that his wife shall join with him in a conveyance, equity will decree a specific performance of the covenant ; that the defendant by accepting the money had undertaken to perform it, and made it an agreement for a valuable consideration, and that it was against conscience, that he should take the money awarded, and refuse to perform the award : that there was a difference between awards to pay money, and to do some collateral thing ; that in the former case the law furnished complete remedy : but in the latter case, where the performance was proper, the law could only give damages, and therefore a bill in equity to obtain specific relief was reasonable, and accordingly the defendant was decreed to perform the award specifically.

4. Equity may compel any person to restore, and deliver up to the proprietor, or to the person who is entitled to them, deeds, wills, bonds, notes, or any writings of a valuable nature, and necessary to evidence any title, claim or debt. Tho the party injured may maintain his action at law, yet he can only recover pecuniary compensation, which is not an adequate relief, and therefore equity will interfere, and compel the delivery of the specific thing.

• A bill will lie to compel the specific delivery of a thing, which is considered as a curiosity, and for which the owner would be unwilling to take the actual value. As where the duke of Somerset was entitled to an old altar piece, remarkable for a Greek inscription, and dedication to Hercules, which came into the possession of a goldsmith, the court decreed that it should be delivered in specie.

5. Injunctions are often granted by courts of chancery, to prevent the doing of certain acts : for which, tho the party injured has a legal remedy for damages, yet the injury being of such a nature that damages will not be a complete reparation, therefore equity will restrain the commission of such acts. Thus where tenant for life, or years, not having a right to commit waste, does, or is about to do those acts, which by law are denominated waste, the heir, remainder-man, or reversioner, may apply to a court of

Equity

equity, and obtain an injunction against the tenant, prohibiting the commission of waste : tho an action at law would lie for the injury : because the relief is more compleat to prevent the injury, than to give damages after it is done : and the destruction of trees for ornament, might be an irreparable injury to the land.

Injunctions have been granted to restrain the publication of private letters and books. A bill was exhibited by the executors of Lord Chesterfield, to restrain the widow of his son, to whom his letters were written, from publishing them, it having been proposed to be done without the consent of Chesterfield in his life time, or of his executors since his decease. An injunction was accordingly granted.

If any person should propose, or offer to republish a book to which another has the copy-right, whether it be the author, or his assignee, such author or assignee may apply to a court of equity and obtain an injunction to restrain such publication. So if an author should sell his copy-right, and afterwards should undertake to republish the work with alterations, yet if it is in substance the same work, he may be restrained by injunction. A general assignment of a copy-right, will transfer the contingent right of the author to the second fourteen years, in case of his surviving the first.

Injunctions have been granted to prevent persons who were building houses, near the house of another, from erecting them so high, as to obstruct the light of his windows : and if there be a dispute as to the right, the injunction may be continued till there can be a trial of the right at law. So injunctions have been granted to prevent a tenant from plowing up a bowling green : and also to prevent acts which would be a damage to a fish pond.

6. Fraud is the principal object of equity jurisdiction, and is only practised in making contracts. We have already fully considered this subject, as it relates to the setting of contracts aside. But there may be instances in which a person by force of a fraud in a contract has obtained the property of another, while the party defrauded has no remedy on the contract, and can derive no benefit from setting it aside. Yet when a knave has thus protected himself

¶ Ambler's Rep. 737. 2 Brown Ch. Rep. 82. 1 Vex. 543. 2 Brown Ch. Rep. 64. 2 Vex. 452.

himself in a fraud, by the forms of law, it is just that he should be compelled to refund his ill gotten gains, and equity having industriously pursued fraud through every labyrinth of cunning, has furnished relief. / As where the projectors of a bubble, called the land security, and oil patent, drew in a number of persons to subscribe for shares, on pretence that the project would be very lucrative, and pledged as security, landed estate of much less value, than the money raised : the subscribers to the scheme, on discovering it to be a cheat, exhibited a bill in chancery for relief, and tho the defendants insisted that land was pledged as a security for the money advanced, yet as it was of much less value, than the money paid, and the whole appearing to be a fraud, the court decreed that the projectors should refund the money to the several subscribers, who had advanced it.\*

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#### CHAPTER TENTH.

#### OF THE PETITION AND PLEADINGS.

**T**HE petition is the same in equity, as the declaration in law. It contains a statement of the facts, which are the ground of the claim for relief. It must be addressed to the court, which has jurisdiction of the matter of complaint, and contain the name and place of abode of the parties. Every person who is to be affected by the decree, should be made a party to the petition.

All the facts must be alledged, which are essential to constitute the claim, which give the court a right to interpose, and which render such interposition necessary. It is the practice to aver that the petitioner has no remedy at law, and to request the court to enquire into the truth of the facts. The petition closes with a prayer for such specific relief, as the party conceives himself entitled to, and also a prayer for general relief. But it would be sufficient to pray for relief generally ; for if the specific relief pray-

\* In some parts of the state, when there has been a mistaken levy of an execution, it has been the practice to apply to a court of equity for an alias : but this is unnecessary, as in all cases, where an execution has been by mistake levied upon the real or personal estate of a man, not the debtor in the execution, and indorsed satisfied and returned, scire facias, or debt upon judgment will lie.      f 2 P. Will. 254

and for; cannot be with propriety granted, the court will, under the prayer for general relief, grant such relief as is adapted to the nature of the case.

To the petition is annexed a citation, directed to a proper officer, commanding him to give notice to the petitioner, defendant, or respondent, to appear before the court, which must be described, so answer to the complaint. This citation must be signed, and the duty certified in the same manner as in suits at law. The process must be served by leaving a true and attested copy of the petition and citation twelve days before the sitting of the court, with the defendant, or at his place of abode, if within this state; if the defendant belong not to this state, and has an agent or attorney here, a copy may be left with such agent or attorney; or if he has none, and the matter in dispute relate to lands, or some suit depending in a court of law, so as to give a court of equity here jurisdiction respecting it, then notice may be given by sending to the defendant, a copy of the petition and citation. This is the only mode in such cases by which that notice may be given to the defendant which is reasonable, to give him an opportunity to defend his rights. The petition must be returned to the clerk of the court, and is proceeded with as a suit at law.

When the defendant has been thus notified, if he is not an inhabitant of this state, the petition must be continued to the next term, like a suit at law: if he is an inhabitant of this state, and neglects to appear, he may be defaulted; and the court having made enquiry respecting the truth of the facts, and the nature of the claim, will pass such decree as the rules of equity will warrant. The court do not proceed on a default in equity, as at law, by taking the facts pro confesso, and rendering judgment accordingly: but they will make enquiry respecting the facts, and be satisfied of their truth, before they will pass a decree.

If the defendant appears, he has a right to make his defence; which may be done in two ways, by pleading in abatement to the petition, or answering to the merits. Pleas in abatement may be for defects in point of form, and for defects in point of substance.

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Formal defects may be to the jurisdiction. If before a court of common pleas, and the sum or matter in dispute, exceeds in value one hundred pounds : if before the superior court, and the matter be less than one hundred pounds, or more than sixteen hundred pounds : if before the general assembly, and the matter is less than sixteen hundred pounds, then such courts have not cognizance, and this is proper in abatement. So if a petition in the court of common pleas, is to controul or effect a judgment of the superior court, or if neither of the parties dwell in the county where the petition is brought, or if there be a misnomer, or misdescription of the parties, or a person in interest, is not made a party to the petition, or is not notified ; or if the petition is not properly signed, and the duty duly certified, or if the process is not legally served ; these matters may all be pleaded in abatement. So may a defect in points of substance, which is in the nature of a demurrer. Therefore if the petition does not state such facts, as entitle the petitioner to the relief prayed for, or if it is apparent that from the facts stated in the petition, there is an adequate remedy at law, this may be pleaded in abatement.

If the opinion of the court should be, that the plea in abatement is sufficient, then the petitioner has the same right to amend as at law. All defects which are in their nature amendable may by force of the statute be amended ; such as misnomer, misdescription, or the omission of any facts, which can be supplied. But where the petition abates on account of jurisdiction, non payment of duty, bad service, or because the case is not a proper subject of equity jurisdiction, or there is an adequate legal remedy, then from the nature of the thing, the petition cannot be amended. If the petitioner amends, the petitionee will have the same right to plead in abatement, as at law.

If the petition does not abate, or having abated, is properly amended, or if no plea in abatement is exhibited, then the defendant may answer to the merits of the claim. He may if he pleases make an answer to the petition, and state the facts on which he relies for his defence, and the petitioner may reply : but no system of pleading has ever been adopted in matters of equity, by which the dispute is brought to a single point as at law. The usual  
and

and most common practice has been for the defendant, not to make any plea or answer, but to proceed to a hearing of the petition at large. In many cases it would unquestionably be convenient, where the case depends on a single point, for the parties by concession in pleadings to bring that single point in view, and shorten the trial, by rendering it unnecessary to prove facts that were not contested. And this may now be done, for the defendant in his answer might state the grounds of his defence, and point out the facts in the petition, which he denied. The petitioner in his reply, might alledge such new facts as he thought proper, to obviate the answer of the defendant and deny the facts he intended to contest. But on this head, no rules have been adopted, there is no regular mode of closing the pleadings, either party may cease to respond or reply when he pleases, and the court will proceed to examine with respect to the truth of the facts in contest, between the parties.

But as the defendant when he makes no answer, may take advantage of any defect of proof on the part of the petition, or insufficiency of the facts stated, as he may adduce witnesses to contradict and disprove such facts, and may take advantage of as many various points and different distinct matters, as are in his power, to remove the ground of the claim, this mode has generally been pursued: for the defendant may derive from it every advantage that could possibly be derived from pleading specially. It is a mode well calculated to bring before the court, every fact that can in any shape be material in the decision of the question. The plaintiff will at first be confined to point his proof to the facts alledged in his petition, the defendant will be indulged to extend his proof to any matter, that is a good equitable ground to remove, or rebut the challenge of the plaintiff: who in his turn will be allowed to counteract such testimony by other witnesses. The cause being heard upon this broad basis, the court have the fairest chance to decide with respect to the sufficiency, and the truth of the facts in question, upon the most liberal and comprehensive views of justice, without those embarrassments in which they are sometimes involved by the technical and narrow rules of special pleadings in suits at law: and tho' to a jurist conversant only in the English law, it might appear a wild theory to admit such an extensive range of



testimony, and variety of points of defence, without reducing them to writing, yet on actual experiment, it has been found that the practice is not only easy and convenient, but tends greatly to facilitate the investigation of truth, and to promote the cause of justice.

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CHAPTER ELEVENTH.

OF TRIALS IN EQUITY.

**W**HEN the defendant puts the facts in the petition on proof, by making no written answer, or if the parties in the course of pleading contest certain facts, their truth is then to be ascertained by the examination of witnesses. The court may either try the facts themselves, or they may appoint a committee for that purpose, who may examine the witnesses and report the evidence to the court. This mode was borrowed from the practice of the general assembly, when they acted as a court of equity, and in long intricate cases, where there is a great number of witnesses, it will be found very convenient. The committee are to be considered in the nature of a jury, their report is to contain the state of facts as appears from the testimony of witnesses, and on such report, the court will ground their decree. But the most usual practice is for courts to hear and examine the witnesses, and decide upon the facts in the same manner as they determine issues, when sitting as a court of law.

The rules with respect to the admission of witnesses, and the taking depositions, are the same in chancery, as at law, excepting in two instances: parol evidence may be admitted to controul a written contract under certain circumstances: and the plaintiff in his petition may call upon the defendant to disclose facts, which rest solely in his knowledge.

1. The rule of law is, that every written contract must be construed according to the face of it, and that parol evidence cannot be admitted to contradict, controul, or vary its operation: but equity in certain cases will relieve against the rigor of this rule of law. In treating of contracts, I have explained this subject: it will be sufficient to remark here, that parol evidence is admissible to shew an omission

omission, or a mistake in a written contract, or a subsequent agreement, which sets aside the former ; and a parol discharge of a written contract, is good in equity.

2. Where the facts rest in the knowledge of the party, and the plaintiff has no disinterested proof, he may appeal to the conscience of the defendant, cite him before a court of equity, and call upon him to disclose on oath, what he knows respecting the subject. If the defendant should refuse to appear and disclose on oath, the facts stated in the petition would be taken pro confesso, or if on disclosure he should substantiate the facts, courts might proceed to pass such decree, as they would if the facts had been proved by disinterested testimony. The defendant cannot be compelled to disclose on oath, any facts which tend to criminate himself, or subject him to any punishment or penalty ; nor is he bound to testify respecting any matter which does not belong to the jurisdiction of a court of equity. When the plaintiff appeals to the conscience of the defendant, he will be bound by his testimony, and will not be admitted to contradict it or impeach his character.

Bills of discovery are frequently brought in England, to discover facts resting in the knowledge of the defendant, or deeds, or other writings in his power : and seek no further relief in equity, than the discovery and delivery of the deeds : which is done, to take advantage of such discovery in an action at law. I have never known any such bills to be brought in this state : but I apprehend that they would be sustained by a court of equity.

In England it is a frequent practice to grant injunctions, to stay proceedings at law, while a bill is pending in chancery for the same matter and thing. In this state such injunctions are rarely necessary, for as every court has an equity, as well as a law side, it will commonly be the case, that where a suit at law is pending, and the defendant has occasion to apply in chancery, he may usually prefer his petition to the equity side of the court, where his action is pending, who will if it had been reasonable to have granted an injunction, order the cause to be delayed till the suit in equity is determined. So if the suit at law is before a different court from  
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the suit in equity, the pendency of a bill will be considered as sufficient reason to authorise the court to delay the cause. In consequence of this injunction to stay proceedings at law, pending the bill in equity is rarely necessary: but if it should be necessary, courts of equity have power to grant injunctions for that purpose.

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CHAPTER TWELFTH.

OF DECREES IN EQUITY.

**W**HEN the court have investigated the facts contested by the parties, either by examining the witnesses themselves, or by a committee, whose report is returned to court, if the facts stated in the petition are not proved, or if they are not such as entitle the party to relief prayed for, or if the defendant rebuts the equity of the plaintiff's claim by matter set up and proved by him, the court will determine that the petitioner shall take nothing by his petition: but if the facts are substantiated by witnesses, and contain sufficient equity to authorise the interpolation of the court, they proceed to pass a decree.

A decree is the final sentence, or order of court, pronounced on a hearing of all the points in issue, and determining the right of all the parties in the suit according to equity and good conscience. It is the same in equity, as a judgment in a court of law. The decree should count upon the petition and pleadings, if any, and should state all the facts which are found to be true by the court, and which are the grounds of the decree. Where the court decree the payment of a certain sum of money, they grant execution in the same manner as a court of law. Where they decree the performance of a specific act, or enjoin the refraining from a particular act, it is done under a certain penalty. Thus where the court find that the petitioner has an equitable right to land, to which the defendant has the apparent legal title, they may decree that the defendant shall release all his right and title, to the plaintiff, within a certain time, under a certain penalty. If the plaintiff is in possession and the defendant has brought his action, the court may also lay an injunction on the defendant, and all others, not to proceed at law: by which they can effectually secure the plaintiff in  
the

the possession of land, to which he has a right. But if the defendant is in possession of the land in question, the court can only decree that he shall convey to the plaintiff under a certain penalty ; if he refuses to convey, they cannot put the plaintiff into possession of the land, but must leave him to a recovery of the penalty, as a compensation for damages. So that in all cases, the courts of equity are said to have the power to enforce the specific performance of a contract, yet they cannot do it by putting the party into the possession of the thing to which he is entitled, and which he would obtain on a specific performance : they can only enforce their decrees by penalties. If the defendant has property, the operation of a penalty may be sufficiently severe, to induce him to comply with the decree : but if he has not property, he is out of the reach of penalties. It therefore appears, that there is a defect in the power of a court of chancery, to enforce their decrees in this respect : they ought to be enabled in all cases where they find the plaintiff has equitable right to the possession of a thing, especially of lands, to issue an execution, commanding and empowering the sheriff, to put him in actual possession, and to turn out the defendant, in the same manner as courts of law can in actions of disseisin, where the legal title is found to be in the plaintiff.

Courts of equity have right to grant injunctions, to restrain parties from bringing suits at law, from proceeding in suits that are pending, or to enforce the execution of a judgment already rendered : but they cannot take away the legal right, or set aside and vacate the judgment. \* But as it would be improper for inferior to controul superior jurisdictions, it is provided that all suits for relief in equity, against any judgment given, or cause depending at law, in the superior court, shall be brought to the superior court, and not to the courts of common pleas.

If the defendant fails to do the act, which he is decreed to perform, or disregarding the injunction, does the act which he was prohibited to do, by which he incurs the penalty, a writ of scire facias may be brought on the decree, to recover the sum forfeited ; and tho it be for the recovery of a penalty, yet as it is incurred by the contempt of a decree of the court, they will never  
relieve

relieve the defendant against it, but will subject him to the payment of the whole sum. A *scire facias* lies only before the court, who passed the decree: but being in the nature of a suit at law, would be appealable in the same manner, as actions at law. \* An action of debt will lie on the decree of a court of chancery, to recover the penalty, for not performing the decree.

Costs are to be paid according to the discretion of the court. It is a general rule, where the petition is dismissed on a plea in abatement, the defendant shall recover cost: but where a trial is had upon the merits, the court have a discretionary power to order the payment of cost, as shall to them appear just and reasonable, according to the circumstances of the case.

A decree can be set aside only in two ways; by a bill of review, and writ of error. \* By the English principles, bills of review, are of two sorts, one founded on supposed error, appearing in the decree itself, and the other on new matter, which must arise after the decree, or upon new proof, which could not have been used at the time, when the decree passed. A writ of error seems to be a compleat remedy in case of error apparent on the face of the decree, and therefore I presume a bill of review, could not be maintained on that ground: but where new matter arises after the decree, or there is a discovery of new evidence, which could not have been had at the trial, a bill of review is sustainable, and is in the nature of a petition for a new trial at law.

† Writs of error by statute, will lie for manifest and material error appearing of record, in any decree, passed in a suit for relief in equity, in the same manner as in proceedings at law. Of course this writ lies from the court of common pleas, to the superior court, and thence to the supreme courts of errors, who are the dernier resort in matters of equity, as well as law.

It is interesting to observe the conciseness and simplicity introduced into our proceedings in equity, and it would be amusing to contrast them, with the complex and circuitous mode of proceeding in the English courts of chancery. While our mode is the plainest, their mode is the most intricate that ever has been adopted by a

tribunal

\* *Dakelsy, vs. Roots*, S. C. 1794.    \* 3 A:k. 26.    † Statute, 37.

tribunal of justice. Volumes are required to give the detail of mere forms : and such is the system of delay, that years are required for the final decision of a suit, which is prosecuted with all possible dispatch. This immeasurable delay, has become proverbial. Suits have been frequently depending, till the parties originally interested were no more, and fortunes have been often wasted in settling a contested right.

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P O S T S C R I P T.

THE author is bound to express his obligations to Judge Root, for the use of his notes, taken since he has been on the bench of the superior court, and from which many adjudications have been extracted ; and also to Mr. John Trumbull, of Hartford, for his friendly attention to the correction of the work, by which many errors have been prevented. He should do injustice to his feelings, if he did not express the most grateful sentiments, to the respectable list of subscribers, who have honoured him with their patronage and encouragement in every part of the Union. Should he meet with their approbation, it will be an ample reward for the years which he has devoted to a work, which is the first attempt in America, to digest the laws of a State, and which he now presents to the public, with the hope that the difficulty of the undertaking, and the utility of the design, will secure it a favourable and candid reception.

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Ex. 8. a. a.

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